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No. 2978 1101

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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THE SHARPLES SEPARATOR COMPANY

(a corporation),

*Plaintiff in Error,*

VS.

W. W. SKINNER,

*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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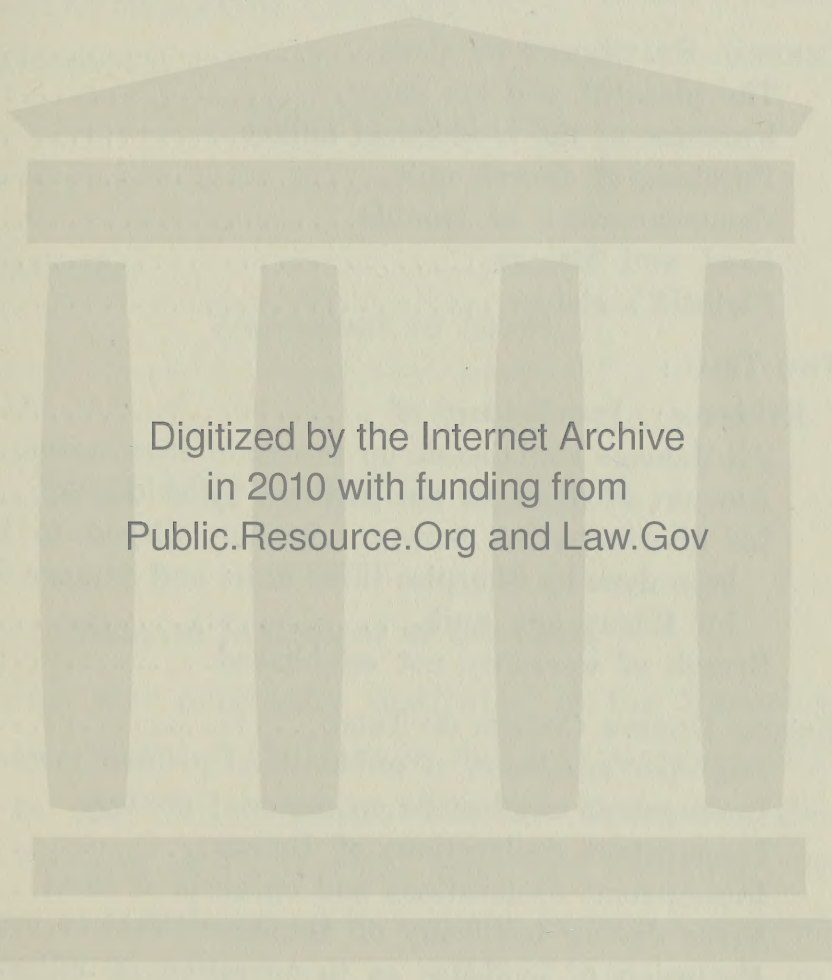
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### General Statement of the Case.

This cause was originally instituted in the Superior Court of the State of California, but was subsequently removed to the United States District Court for the Southern District of California, Southern Division. It is an action at law designed to recover damages claimed to have been sustained by an alleged breach of an alleged warranty. The plaintiff obtained the verdict below, and in due course this writ of error issued.

It is our purpose to make a general statement of the leading features of the case as disclosed by the record. We do not conceive this course to be inappropriate: it will illustrate the theories of the contending parties:



it will assist the proper understanding of the rulings of the learned judge of the court below: it will exemplify the importance to the present plaintiff in error of correct instructions upon the legal issues involved: it will facilitate intelligent treatment of the charge of the learned judge below to the jury, especially in view of the right enjoyed by the defendant below, in common with every litigant, to have instructions given the jury to meet his theory of the case; and it will, we venture to believe, lighten the labors of this court by manifesting and clarifying the perspective of the case.

W. W. Skinner, the plaintiff below and defendant in error here, was a resident of El Centro, Imperial Valley, California; and when, on October 10, 1916, he testified in the court below (110), he had been such resident for at least five years (111),—ample time, one would suppose, within which to become acquainted there and to contract friendships among his fellow dairymen. What Mr. Skinner's prior activity may have been is not disclosed, but, during this period of his residence at El Centro, he had been engaged in the dual occupation of dairying and ranching (111). It is not established that, prior to his advent in El Centro, he had enjoyed that experience in dairying which might have qualified him to speak with authority upon dairy questions: nor, after his arrival at El Centro, does the record disclose the relations between his dairying and his ranching activities. We are nowhere advised as to how much space, care, time or attention he gave to dairying, or how much to ranching:

which of these activities predominated, is nowhere exhibited; and there is nothing in this record, as we read it, to justify any claim that he devoted more time to dairying than to ranching, or to show what amount of time he actually surrendered to dairying in particular. In a word, Mr. Skinner's experience and qualifications as a dairyman are quite indistinct and this record is perfectly consistent with the claim that he was primarily a rancher, that he left the dairying to his wife, son and hired youth ("I am familiar with "the string of dairy cows owned by my husband; "at that time, before we got the milker, I had "milked most every cow in the corral"—Mrs. Ida Skinner, 170: "After the milker was installed, it was "operated by myself and the other hired man"—Aubrey Skinner, 166: "I got to operating the machine—"that is, I would go in, watch the boys and help; I "would be in there—well, I have operated that, not "regular. \* \* \* This young man Allen and my "son did most of the milking"—Skinner, 145), and that his personal experience with dairying was not of a character to invest with impressiveness his views upon dairy questions. In both his original (8) and amended complaints (59), he voluntarily describes himself as "farmer and dairyman", rather than as "dairyman and farmer".

Mr. Skinner was a married man. His family consisted of his wife, Mrs. Ida Skinner, and a young son, Aubrey, who, at the time of the occurrences adverted to in the record, was an inexperienced boy of about 21 years of age (166). The family lived



together at El Centro, and it is not unreasonable to infer that, during their five years of residence there, they had become acquainted with other residents of Imperial Valley, so many of whom appeared in rebuttal to help out the case of their neighbor. To assist in the dairying, Mr. Skinner hired a young man named Allen who was about the same age as Mr. Skinner's son—"22 or 23 years old", as Mr. Skinner tells us; and, as Mr. Skinner further tells us, "This young man Allen and my son did most of the milking" (145),—a circumstance not without significance in view of the claims subsequently made by Mr. Skinner, and in view of the uncontradicted statement of Dr. Hart, the veterinary surgeon, that "there are men of the type of milkers that are found around this country that even though they thought they were following the instructions as given in this book by the Sharples Separator Company, he wouldn't be following those instructions, and had no knowledge of mechanics, and that type of men are not considered sufficiently capable of handling a milking machine, even though they are capable of hand milking cows" (200). At the trial below, Mr. Skinner and his wife and son were the only witnesses presented in the case in chief. The sanitary condition of the Skinner dairy was put in issue by the answer (75-6), and was a highly material matter: yet, not only was no inquiry made from Mrs. Skinner, or from the son, as to that sanitary condition, they being much more familiar with it than any chance or casual visitor, but Allen was as a witness conspicuous by his absence, although not shown to have been inaccessible to the plaintiff below or accessible to the

defendant below, although no explanation to account for Allen's significant absence was attempted by the plaintiff, and although it was not shown that at the time of the trial Allen was no longer in the employ of the plaintiff—*non constat* but that Allen was then actually in the plaintiff's service. It is, of course, familiar learning that the conduct of a party to an action in omitting to produce evidence materially bearing upon the matter in dispute, which is within his power and rests peculiarly within his own knowledge, and which under the circumstances would be expected to be produced, frequently affords a presumption against him that such evidence, if produced, would operate to his prejudice. In such cases, the natural inference is that the evidence is held back because it would be unfavorable: that is to say, the failure to call an available witness possessing knowledge concerning facts essential to a party's case, or to examine such witness as to the facts covered by his special knowledge (as, for example, in the instances of Mr. Skinner's wife and son as to sanitary conditions), especially if the witness be naturally favorable to the party's contention, gives rise to the inference that the testimony of such unproduced or unexamined witness would not sustain the contention of the party. If, at the times and places of the occurrences referred to in the testimony, Allen was in the employ of the plaintiff, then he will be presumed to be still in the employ of the plaintiff, unless otherwise shown by the plaintiff; and if Mr. Allen were available to Mr. Skinner as a witness upon the trial,—and Mr. Skinner has not shown that he was not,—then the defendant below should not be



put to the risk of resting its defense upon the testimony of Skinner's employee, nor should the defendant below be compelled to surrender the right of cross-examination or the just legal inference arising from the failure to call Allen as a witness. In a word, it was the plain duty of the plaintiff to produce Allen as a witness, or to explain his absence; and since the plaintiff has failed to do either, such failure gives rise to the inevitable inference that the testimony of Allen would have been unfavorable to the contention of the plaintiff. (As supporting these views, see, *inter alia*: *R. v. Burdett*, 4 B. & Ald. 122: *Clifton v. U. S.*, 45 U. S. (4 How.) 242: *Runkle v. Burnham*, 153 id. 226; *Kirby v. Talmadge*, 160 id. 379: *The New York*, 175 id. 204; *The Fred. M. Lawrence*, 15 Fed. 635: *McFarland v. The J. C. Tuthill*, 37 id. 714: *The Jos. B. Thomas*, 81 id. 578: *Waterhouse v. Rock Island Co.*, 97 id. 477: *Am. Bell Tel. Co. v. Nat Tel. Mfg. Co.*, 109 id. 1018: *In re Kellogg*, 113 id. 120: *The Robert Lewers*, 114 id. 849: *Sauntry v. U. S.*, 117 id. 132: *The Georgetown*, 135 id. 859: *Choctaw Ry. v. Newton*, 140 id. 238: *The Degama*, 150 id. 324: *Norquet v. Paramount Mills*, 177 id. 975: *Metr. L. Co. v. Davis*, 205 id. 486: *Sherman v. S. P. Co.*, 111 Pac. (Nev.) 416, 422-3: *Vandervort v. Fouse*, 43 S. E. (W. Va.) 112: *Briedenbach v. McCormick Co.*, 20 Cal. App. 184, 189: *Standard Oil Co. v. State*, 100 S. W. (Tenn.) 705, 718: *Cummings v. Nat. Furnace Co.*, 18 N. W. (Wisc.) 742; 20 id. 665; *Boler v. Sorgenfrei*, 86 N. Y. S. 180; *Maus v. Broderick*, 25 So. (La.) 977: *Anderson v. Cumberland Co.*, 38 So. (Miss.) 785, 787-8).

So far as the sanitary conditions at this dairy are concerned, it does seem that those who had opportunities for observation might well have supplied us with something more than obscure generalities: but the information furnished us by Mr. Skinner, Mr. Skinner's family and Mr. Skinner's Imperial Valley witnesses is not, to say the least, creditable to that aspect of Mr. Skinner's premises. We are told that he had a herd of cows there: we observe that he is not backward in commendation of his own cattle: but we get no satisfactory information as to the size of the dairy, or as to the methods, appliances or conveniences employed in its operation, or as to the degree of its approximation to approved modern sanitary dairy methods or conditions. Not only are we left in the dark as to this, but the evidence quite fails to put Mr. Skinner in advance of the average of his fellow-dairymen in Imperial Valley, so far as this vital matter of sanitation is concerned: he shares their prejudices: he entertains the view that what was good enough for his neighbors was good enough for him, regardless of the views of others: except under stress, no convincing reason appealed to him to spend money—not even ten dollars, to install a clean floor in a milking barn (142)—to please theorists; and his general mental attitude as to sanitary conditions or improvements was not such as to stamp him an apostle or pioneer of cleanliness. When the sanitary advantages of a cement floor are put squarely to him, he fails to answer, and becomes coy—not to say evasive (141-2): but it nevertheless appears that Imperial Valley standards of sanitation were not of the highest, that it was not customary



for local dairymen there to cement their floors, and that most of them have just an ordinary dirt floor (141); and in accord with these views of his fellow-dairymen, Mr. Skinner made no attempt to install a cement floor until after he had got into touch with this plaintiff in error (140-143).

The same disregard of sanitation re-appears in the matter of stanchions: their function "is to secure a cleaner milk supply, to prevent the cattle from moving around in a manure-laden corral while milking is being done" (196): the prior attention of either Mr. Skinner or his fellow-dairymen in Imperial Valley does not appear to have been attracted to this advantage so obviously conducive to good sanitation; and, like the cement flooring, the presence of these stanchions was a product of Mr. Skinner's contact with the present plaintiff in error.

One would suppose that a dairyman, sensitive to his sanitary surroundings, would regard an adequate barn as a component part of an adequate dairy, but Mr. Skinner classified a barn among the elegant superfluities of an effete civilization: during his five years of residence in Imperial Valley prior to January, 1914, he had no barn at all: no more significant exposure of his lack of appreciation of his sanitary obligations could well be desired than that contained in his contemptuous remark, when asked whether his barn would not be more sanitary were a floor installed, that "I would not give a man \$10 to go and install one" (142); and the presence of liquid and manure deposited upon a dirt floor, with these very cows treading and stamp-

ing in the mud (142), would not, therefore, attune Mr. Skinner's delicate appreciation to finer or higher issues of sanitation.

The disclosures of this record as to the drinking places provided by Mr. Skinner for his cows, are not such as to excite any surprise at the information that those cows were afflicted with contagious, or infectious, mammitis. "All of the water in Imperial Valley comes "from a common source, the Colorado River" (153): this water is impregnated with silt (180), and must be settled in settling basins (152): a bacteriological analysis of this general water supply showed large numbers of organisms of the yellow micrococcus variety, the morphology of which, as well as their cultural and biochemical character, were identical with those found in the milk taken from Mr. Skinner's cows (180-181); and no attempt was made to attack these statements of a highly experienced specialist of unimpeached integrity. Prior to the fall and winter of 1913, there was not even a settling basin upon the Skinner premises (153): most of the Skinner cows drank out of the irrigation ditch: a great many of them would walk right into the ditch, and when they did the udders and teats would get into the water (154 *ad finem*); and in all this, Mr. Skinner followed the example of his fellow-dairymen, it being the fact that "most of the "people in the Imperial Valley permit their cows to "wade out in the irrigating ditch" (154). Nor was this all: there was a water or mud hole on the premises in which animals were occasionally seen: a pig was seen drinking there: sick calves were occasionally seen in it;



and, after the mechanical milker was installed, parts of it, namely, the teat cups, stood over night in a pail of the water from this water or mud hole (236, 237, 238); and these facts appear from a deposition taken for Mr. Skinner, but, with great discretion, not offered by him upon the trial (233).

Mr. Skinner did not, judging from his conduct, believe that any canon of sanitation called on him to take active measures to improve the water which his cows drank and in which his dairy utensils were washed. All of his water—infested by the yellow micrococcus—came from the Colorado River: as he says, “I take “my water from this same common source of water “supply” (155): “it was not well water of any kind, “it was not pump water” (235): “it was not clean “water” (238): “in 1914, practically everybody who “had dairy herds was using water from these canals” (262); and in the opinion of the Inspector for the State Dairy Bureau who was called by plaintiff, but who never was applied to by Mr. Skinner for a certificate to the cleanliness of his dairy, “I would not consider a “dairy which had a mud hole a sanitary dairy” (265).

Nor is this the whole story: because, not only did Mr. Skinner, whose insensibility to his sanitary responsibility was so great that to help to discharge it he would not spend even \$10 (142), permit his cows to wade into this tainted water (154, 181, 194), but the animals themselves were unclean: they were not groomed (179): their bodies and legs were muddy (id.)—a condition which reflects very unfavorably the state of the Skinner premises; and this very mud is,

if anything, an even more potent agency in spreading contagion than the water itself. As observed by Dr. Hart: "As the probability of a cow becoming infected  
 " with infectious mammitis, if the water in which she  
 " waded, or the mud around the farm contained water  
 " infected with staphylococci, if the cow was in the  
 " mud, the probability would be greater than in the  
 " water. It seems that in corrals, the experience that  
 " we have found around the City of Los Angeles, has  
 " been that where cows are in muddy corrals, so that  
 " they have to lie down under wet conditions, and  
 " mud sticking around the teats, that there is con-  
 " siderable or some greater probability of infectious  
 " mammitis than if they walked through streams of  
 " water" (194-5).

And the premises were no better groomed than the cows: the same unprogressive spirit which permitted the cows to become mud-caked, permitted the premises to go for a month at a time without cleaning (158): the unfastened cows were free to move about or lie down in the manure-laden yard (157-8); and the fact that "we would not clean it (the yard) out very day;  
 " sometimes not for a month" (158), caused Nye, a witness for the plaintiff, to declare that "if they  
 " milk cows in the yard, and only clean the droppings  
 " out once a month, that would not be a sanitary  
 " dairy" (264),—a point of view in which Rodgers, another of plaintiff's witnesses, concurred (266). But is it really necessary to contend that, in a dairy of all places, sanitary conditions require, not only the absence of tainted mud, but also continued and unbroken cleanliness? Does not that situation speak for itself?



Could any reasonable person pronounce sanitary a dairy in which either the utensils or the hands of the milkers were unclean (238)? Would not this aspect of the situation at once attract the attention of a proprietor sensitive to his sanitary duties and progressive enough to care something more for cleanliness than a ten-dollar piece? But there can be no disguising the fact that it was the same old water that was upon the premises—Colorado River water (156-7), with its yellow micrococcus organisms “identical with those “obtained from the udders of the Skinner cattle” (181). Dr. Taylor realized the folly—not to use a harsher term—of using this water to wash milking utensils, and asked the plaintiff whether the water was boiled before being used; and it was Dr. Taylor’s recollection that the plaintiff said that the water was simply heated but not brought to the boiling point—a condition wholly incompetent to sterilize articles washed therein (180). This statement of Dr. Taylor is nowhere contradicted: indeed, it could not be contradicted by Mr. Skinner, because, as to all that relates to Dr. Taylor, Mr. Skinner relapsed into a typical *non mi ricordo* witness (152). Even if the water had been boiled and then cooled, so that the water itself, standing alone, would be sterile, yet as soon as the milking utensils were placed in it, that water would immediately become infected with bacteria, and no sterilization of the utensils would ensue (196-7). And that this water was an effective instrumentality for the propagation of contagion was a postulate in the cause (193-4; 238-9): even the teat-cups of the milking machine were washed in water that “was inhabited by sick calves and hogs”

(238); and, in addition to all this, where infectious or germ-laden dust, as is frequently the case, gets “blowing around the milk house”, such a condition is not conducive to the maintaining of sterile milking utensils (216). This lack of cleanliness, this disregard of the most obvious requirements of proper dairy sanitation, was no new thing: it is precisely the condition one would expect to find upon the premises of an unprogressive person who was content to follow the unprogressive methods of his unprogressive neighbors; and no surprise is excited when we find Reed, whose deposition was taken on behalf of the plaintiff, telling us that “before I went down there, cows were “milked by hand; when I first came down, they were “all milked by hand; the men did not wash their “hands during the milking. They only washed their “hands when they came out to milk the cows, and “then from a private cistern at the house. The water “in this cistern at the house came from the irrigation “canal on the West Road” (238).

What, then, is to be thought of a dairy operated by a man unresponsive to the requirements of adequate sanitation and content to follow the indifferent methods of his neighbors, whose actual conditions were those of dirt, who had no barn, no stanchions, no cement or even wooden floor, whose water was tainted by bacteria, whose cows waded into and drank of this tainted water, whose cows were not groomed and were permitted to roam about and lie down in the mud of a urine-soaked yard and become mud-caked, whose yard was not systematically cleaned at short intervals but at



times allowed to go uncleaned for as long as a month, whose milking utensils were not properly sterilized and were washed in the tainted water, and the hands of whose milkers were allowed to become potent factors in the dissemination of disease? Can such concrete facts as these be met by general asseverations of cleanliness, however vociferous? Can it be fairly said of such a place as this that in it "all reasonable precautions tending to the production of clean milk" (114, at top) were observed? What hope for the future could arise from such unprogressive, backward and insanitary conditions as these? Is it any wonder that a man of Mr. Skinner's unprogressive type should assert that "the cows had not been exposed to any "contagious disease" (121), and should refuse to believe in the presence of contagious mammitis among these cows (237)? Is it any wonder that no veterinarian was produced who was able to say rationally and credibly that, from an examination of these animals, "the cows had not been exposed to any contagious "disease" (121)? Is it any wonder that this plaintiff in error offered to prove—but was prevented—that Imperial Valley dairy products were not permitted to enter the City of Los Angeles (200, 264)? Is it any wonder that even Mr. Skinner himself was constrained to testify thus (142-3):

"Q. In fact, that is the cost of fixing up your "barn, including the cement floor and the stanchions, "and cleaning up the surroundings *to make them sanitary?*

"A. Yes, sir."

Upon this vital matter of sanitary conditions, Mr. Skinner does not commend himself as a sincere or straightforward witness: he is too evasive. When questioned directly as to the advantages of a cement floor, he fails to answer (141-2): when asked whether he increased or decreased the pressure upon the cows, instead of answering directly as to what he did, he proceeds to relate what certain unidentified persons said, and then launches into unspecific and irrelevant generalities (148-9); and without adducing further examples, when dealing with the garget with which his cows were afflicted before he ever saw the mechanical milker that he subsequently purchased, he furnishes a typical illustration of evasion and lack of straightforwardness (150-1); and his testimony as given on page 152 of the Record is replete with evasive improbabilities.

Indeed, Mr. Skinner's whole mental attitude towards sanitation was unsympathetic: no one could well have been more unprogressive: he had no proper barn: he had no proper floor at his milking station: he had no stanchions: he had no engine to operate his separator: he took no pains with his animals: he took no pains with his milking utensils: the condition of the water mattered nothing: the condition of the premises was equally inconsequential: he clung to the primitive and out-of-date ideas and methods current among his fellow-dairymen of Imperial Valley; and he fell into that class of which Dr. Hart spoke when he said that "there are men of the type of milkers that are found "around this country that even though they thought



“ they were following the instructions as given in this  
 “ book by the Sharples Separator Company, he wouldn’t  
 “ be following those instructions, and had no knowl-  
 “ edge of mechanics, and that type of men are not  
 “ considered sufficiently capable of handling a milking  
 “ machine, even though they are capable of hand  
 “ milking cows” (200). Taking together all of the  
 concrete information accessible, it is not too much  
 to say that the actual conditions upon Skinner’s dairy  
 were those of a dirty and insanitary dairy: Skinner  
 himself concedes that when Reed came in October,  
 1914, dirt had found its way into the milker (129);  
 and Reed, whose deposition Skinner took, when speak-  
 ing of the dairy shed and its gutters, tells us that  
 “ I remember making a statement that the gutters  
 “ were not fixed right, did not run off right, and that  
 “ *it was an awful dirty place; and it was a dirty place*”  
 (238).

Mr. Skinner tells us that “about the first of the  
 “ year 1914, I had negotiations looking towards the  
 “ purchase of a mechanical milker, at my home, three  
 “ miles east and north of El Centro; these negotia-  
 “ tions were opened by one Mr. Hickson on behalf of  
 “ The Sharples Separator Company people” (111);  
 and it is not difficult to distinguish, in Mr. Skinner’s  
 account of the matter, between the preliminary negotia-  
 tions and the actual transaction itself. Thus, on page  
 111, he speaks of “*negotiations looking towards the*  
 “ *purchase*”, and of the circumstance that these  
 “ negotiations” were “opened”. And not only were  
 these negotiations “opened”, but, as might well be

expected, they continued in progress until the ultimate transaction towards which the parties were progressing was finally accomplished: there is no pretense in this record that this purchase was an instantaneous act stripped of all prior negotiation; and when we find Mr. Skinner using the phrase “*during the negotiations*” (112), we readily perceive that he himself discriminated between the antecedent negotiations and the actual transaction,—a view which finds confirmation in the statement that “this little pamphlet, *or one like it*, was left *with me* PENDING NEGOTIATIONS” (116). It appears from Mr. Skinner’s statement that “during the negotiations” which preceded the execution of the written contract relied on, “certain printed literature published by The Sharples Separator Company” was delivered to Mr. Skinner by a person whom Mr. Skinner describes as “their sales agent”,—though just what authority Mr. Skinner had for this description is nowhere disclosed; and of this printed matter, certain fragmentary parts, *selected by plaintiff’s counsel* as, in *his* opinion, “pertinent to this case”, were allowed by the learned judge below to be read in evidence to the jury (111-2, 114-8), over the objections and exceptions of this plaintiff in error; this was done without any appeal to the plaintiff himself, and without any proof that the fragmentary passages so read by counsel of his own head, were passages which the plaintiff read or believed, or relied or acted upon; no proof was made that the passages read had influenced the plaintiff in any way: plaintiff’s counsel was, indeed, rather, naive in the matter, plainly telling the jury that “I will



“ read you that portion of the printed literature of  
 “ the Sharples Separator Company *which I deem per-*  
 “ *tinent*” (116)—not what Mr. Skinner deemed pertinent in January, 1914, but what counsel deemed pertinent on October 10, 1916; and obviously, if counsel did not consider these passages from this printed matter, to exert upon the jury an influence favorable to his contention, he would not have read them into evidence. Not only, however, did this action of the learned judge violate the parol evidence rule (California Civil Code, Sec. 1625), but the Record fails to show that the selected passages read to the jury were selected from the “printed matter” referred to in the contract of January 2, 1914, plaintiff’s Exhibit 1. Mr. Skinner not only does not identify the selected passages as being part of the “printed matter” referred to in the contract, but he does not identify the selected passages themselves: he makes no pretense of identification: he concedes his inability to recognize: he indulges in a mere conclusion when he speaks of “or one substantially like it”; and he not only fails to trace the material to a proved agent of the company, but he wholly fails to show that it was within the scope of Mr. Hickson’s authority—if he had any authority at all,—to bind the company by the distribution of any literature—for it is not yet the law that a company may be bound by any act or declaration of an unauthorized person (112). And this same lack of identification of the alleged printed matter itself, reappears on page 116: there, in two places, Mr. Skinner is plainly uncertain as to the identity of the pamphlet exhibited to him: he speaks in the disjunctive:

he refers to this "*pamphlet, or one like it*", but makes no attempt to explain the character or degree of similarity involved in the conclusion "*one like it*"—how "*like*", we are not told. Nor does he anywhere identify any particular part of this printed matter as a part which he read or on which he acted; and it is impossible to tell from his testimony what statement, if any, in this printed matter he believed or acted upon. But, nevertheless, these selected passages were allowed to go to the jury and were never expunged from the record: that they were not without influence upon the jury, the verdict demonstrates,—no man, indeed, can say that the jury was not influenced by these unidentified passages.

Mr. Skinner purchased three milking units from the Sharples Separator Company, and paid therefor the sum of "about \$460" (146). This purchase was made on January 2, 1914 (59); and it was made under and pursuant to the contract set forth on pages 112-114 of the record. The contract specifically provides that it "is subject to the conditions of sale and guarantee printed on the reverse side of this sheet": those conditions go to the mode of operation and care of the machine; and that guarantee goes to defects of workmanship or material, and "further guarantees this machine to be in all respects as represented in its printed matter"—though no identification of this "printed matter" is made, and further guarantees that the machine is "capable of doing the work as claimed" in this unidentified "printed matter". When the three units were installed in February, 1914, young



Allen was the hired man of the dairy, as already related; and "this young man Allen and my son did "most of the milking" (145), both being inexperienced boys. The plaintiff himself tells us that the machine operated by "alternate pressure and vacuum" and that "the amount of pressure and the amount of vacuum" could be regulated, and in that connection makes the following astonishing statement: "The instructions "say that to move this thing right here (indicating "on the machine) would regulate the amount of "pressure and the amount of vacuum; *I do not know "whether it does or not.* I do not know that I ever "tried it by putting my finger in the teat cup to "see the amount of pressure that was caused on my "finger where the cow's teat would be, and on the "pulsator. As to the pressure at which I milk my "cows, I used 17 and 7; the vacuum 17 and the "pressure at 7; *I did that all the time on every cow;* "I made no change in the amount of vacuum and "the amount of pressure when I was milking a large- "teated cow; *I made the gauges stand at 17 and 7 all "the time"* (146-7). And in this connection, and as illustrating the plaintiff's unintelligent mode of user of the machine, as well as his evasiveness, his statements, as contained in pages 147-9 should, we think, be carefully and analytically read, and read in connection with the son's statement on page 169. And not only did the plaintiff fail to follow instructions in this regard, not only did he fail to distinguish between the pressure in the air-line and the pressure that was needed in the teat-cups (226-7), but he admits that he did not boil the teat-cups—the portion of the unit that

comes into contact with the cow. He claims to have cleaned them, but not in boiling water (149); but since nothing short of boiling water would sterilize the teat-cups (197), and since we know the disclosures of the bacteriological examination of the water itself (181), we are able to appraise at its proper value any claim by the plaintiff that he sterilized those teat-cups.

And moreover, he further states, "I never washed  
 "or cleaned the teat-cups between one cow and  
 "another at any time: after I milked the cow I  
 "did not clean the teat-cups before I put them on  
 "another cow" (149-50). If there is a fact settled in this case, it is that contagious mammitis is readily conveyed from one cow to another; and, while infections mammitis cannot be generated by a milking machine where proper care has been exercised to wash and sterilize the teat-cups (184-191, 213, 225, 229), yet the bacteria may come from the hand of a milker, or from the inadequately sterilized teat-cup of a machine, or from water in which the cows were permitted to wade, or from the corral in which they are allowed to lie down (185, 191-2); and consequently no more effective agency for the communication of this disease could well be imagined than that disclosed by the conditions surrounding Skinner's dairy and by his admissions as to his mode of user of the teat-cups. Dr. Taylor tells us (183-4), and it is plain common sense, that affected cows should be isolated; but was that course pursued upon the Skinner dairy? Apparently not: because the plaintiff's son tells us, on page 167, that "Between June 25th and July 7th, we had 14 cows



“in the hospital as we called it, and then there were  
 “more that were not so bad and were left in the  
 “corral *with the rest of them*”; and so with Mrs.  
 Skinner, who says, “I observed the effect of the milker  
 “to be the same—hard and swollen quarters; the cows  
 “were ruined; there was, I think, 17, if I remember,  
 “out of the corral, *and then more that were injured*  
 “*in the corral*” (171). Taking all these facts together,  
 they show plainly that the plaintiff did not comply with  
 the conditions of sale of these three units, and that he  
 did not observe “all reasonable precautions tending to  
 “the production of clean milk” (113-4).

It is to be observed that throughout all this history,  
 no man has been able to put his finger upon any  
 mechanical defect in these three units. The plaintiff  
 was specifically asked to state “what was mechanically  
 “wrong”, and he replied that “I don’t know if there  
 “was anything wrong with the pump” (158 *ad finem*);  
 and he also declared that “aside from the injury  
 “which I claim resulted to my cows, I would not  
 “have any complaint about the milker” (158); and  
 obviously, if, upon the facts here, the claimed injury  
 can fairly be attributed to some cause other than the  
 machine—such as contagious mammitis arising from  
 insanitary conditions and transmitted by reason of  
 the plaintiff’s insanitary methods—then surely it would  
 be most unjust to permit this judgment to stand. Even  
 the plaintiff’s partisan witness Boarts, the value of  
 whose views may be gauged by his conception of  
 sterilization as the rinsing of the teat-cups with cold  
 water followed by a brushing with warm water (263),

and who rather grudgingly declared "I would not say "that I was infallible" (260), and who, of course, like the rest of Mr. Skinner's fellow-dairymen from Imperial Valley, was inimical to the milker machine,—even Boarts was constrained to concede on cross-examination that if the machine had drawn the milk (compare Skinner, 158, just above middle), and performed its mechanical functions all right, it would not have done any injury (261). And so with McCullough, another of plaintiff's witnesses, who made this statement: "My machine worked all right from a mechanical "standpoint; it was mechanically perfect; other than "the injury which I claim it did to the cows, it was "entirely satisfactory; with the possible exception "of the resultant injuries which I alleged happened "to my cows, it did all that I expected of the machine. "The operation of any mechanical milking machine "cannot cause infectious mammitis."

And what goes a very long way to sustain the mechanical sufficiency of this milker is to be found in the fact that no claim is anywhere made by Skinner that he ever notified defendant of any defect in the milker due to workmanship or materials.

Mr. Skinner purchased these three units in January, 1914, and they were installed in February, 1914. Thereafter, he purchased from the Edgar Bros. Company a fourth unit, which was delivered about May 6, 1914 (61). The purchase of this fourth unit was made "after "we had been running the machine some length of time" (118 *ad finem*),—in other words, after having had an experience of two months or more with the original



three units. With the purchase of this fourth unit, the present plaintiff in error had nothing to do: it gave no warranty of any sort as to this unit; and it nowhere appears that in the sale of this fourth unit, Edgar Bros. Company acted as the agent of this plaintiff in error (232-3, 48). And this view of the matter is supported by the declarations of the plaintiff himself, who states, "I did not communicate with any officer or employee of the Sharples Separator Company when I bought the fourth unit, I communicated with no one except Edgar Bros.; I never received any bill from Sharples Separator Company for the fourth unit." And it may be added that upon motion a nonsuit was granted as to the Edgar Bros. Company (174), and the action dismissed as to it (296).

Upon receipt by plaintiff of this fourth unit, he used it indiscriminately with the original three units; and so conscious of this was the plaintiff that, in his own mind, "the injury suffered by the plaintiff as the result of the acts of defendant, Edgar Bros. Company, a corporation, cannot be ascertained or estimated separately and apart from the injury suffered by plaintiff as the result of the acts of defendant, The Sharples Separator Company, a corporation" (29-30). In his amended complaint, the plaintiff asserts that "it was agreed by defendants" that this fourth unit should be affixed to the milker already purchased, "and should be operated jointly with the other three units" (61): but, while no proof was made of the agreement here referred to, and while the plaintiff of his own head did use the fourth unit indiscriminately

with the original three units, this allegation is but an additional item exhibiting plaintiff's own consciousness of this indiscriminate user. And so, on page 136, we find Mr. Skinner saying: "I first began to use the machine about the 7th of February, I think; and I think I received the fourth unit from Edgar Bros. in May; and I took the fourth unit from Edgar Bros. and connected it up and used it after that—after May. I had had other trouble before I got the fourth unit. As to what cows I used the fourth unit on, I used the fourth unit the same as the others. The four units, as nearly as a man could look at them and say, were identically alike; if a man was to hand that unit up and another unit up, he could not go and pick out which were those units. I kept no record of the cows upon which the particular units were used. I did not make or keep any record of the amount of milk obtained from each individual cow" (136). And again, on page 165, he says: "When Mr. Reed went down in October, he only used two units at a time on the 30 that were set aside, and the other two units were not used; Mr. Reed may have used all four of them; I don't know which ones he did use;" and as to this, Reed tells us, "At the time when I was there in October I used two units; I should say that one of those units was from Edgar Bros., and one came from Sharples" (238). And finally, upon this point, the following quotation from the record is not malapropos: "Whereupon, Mr. Parke read to the jury the following paragraphs from plaintiff's bill of particulars:



“ ‘7. All four units were in use before any of  
 “ ‘plaintiff’s cows were seriously injured. The four  
 “ ‘units were used indiscriminately, so that it is impos-  
 “ ‘sible for plaintiff to itemize the injury caused by  
 “ ‘the original three units as distinguished from that  
 “ ‘caused by the fourth unit purchased by plaintiff  
 “ ‘after the installation of the machine. No record  
 “ ‘was kept of the amount of milk each cow gave.

“ ‘19. No information can be given as called for by  
 “ ‘Demand No. 19, owing to the fact that no record  
 “ ‘was kept of the effect of the use of the three units  
 “ ‘purchased from defendant as contradistinguished  
 “ ‘from the effect of the fourth unit subsequently pur-  
 “ ‘chased but will say that approximately twenty of  
 “ ‘plaintiff’s cows were ruined from the use of the four  
 “ ‘units between the 25th day of June, 1914, and the  
 “ ‘7th day of July, 1914. The last half of Demand  
 “ ‘No. 19 appears to be repetition of Demand No. 17  
 “ ‘and the answer thereto has hereinbefore been given’ ”  
 (291-2).

It was after the plaintiff’s purchase and user of this fourth unit that the trouble began, and the significance of this important historical fact should not, we submit, be overlooked. It affirmatively appears from plaintiff’s amended complaint that he purchased the fourth unit “ ‘before plaintiff had discovered that said mechan-  
 “ ‘ical milker was injuring his said cows’ ” (61). In telling his story to the jury, Mr Skinner stated, “ ‘I had  
 “ ‘been running the machine: the fourth unit came:  
 “ ‘trouble *began* to develop’ ” (119); and later on, he remarks, “ ‘I had ordered this fourth unit, and it came:

“ I ordered it before I had any serious trouble” (147). And in his Bill of Particulars the plaintiff repeats that “ all four units were in use before any of plaintiff’s “ cows were seriously injured” (291). Mr. Skinner tells us that “The three units arrived on February 1, 1914” (118): the fourth unit was delivered about May 6, 1914 (61): but no serious complaint anywhere appears of any real trouble between February 1 and May 6, 1914 (118-9); and, in point of fact, the plaintiff himself admitted that “up to June 25th, none of the “ cows had sustained any permanent injury” (120, *ad finem*). And it certainly cannot be contended that the absence of trouble prior to the advent of the fourth unit establishes that the original three units were to blame for any trouble subsequently arising: on the contrary, it would establish that, up to the advent of the fourth unit, the cows had escaped contagion, thus relieving the original three units from responsibility for a condition which arose only after a strange factor had entered the situation.

The plaintiff tells us that “the Sharples people sent Mr. Reed to install the machine: he did so” (118): but just how Mr Skinner knew that the Sharples people sent Mr Reed upon this mission, is one of the mysteries of the case. On pages 120-1, we find Mr. Skinner talking to Edgar Bros, about the milker, and “a few days later Mr. Reed appeared upon the scene”: was this appearance attributable to Edgar Bros. or to “the Sharples people”? At all events, after the machine was installed and instructions given as to its user, Reed left: on this occasion, Reed was upon Mr. Skinner’s



place for “about two weeks” (166: 170); and during that time, the scope of his activity was limited to the installation of the machine and the giving of instructions as to its use—he was merely an installer and mechanical demonstrator, and nothing more. After Reed left in February, 1914, he did not return until June (120 *ad finem*): “up to June 25th, none of the “cows had sustained any permanent injury” (120 *ad finem*): at that time, Reed “ran the machine practically two weeks” (121); and he left on the 7th “of July” (122); and here, again, Reed’s functions were purely mechanical—“he did all the using: he did “everything to it (the milking machine): I never “touched it” (128). And again, in October, we find Reed operating the machine (129), and he so continued until December. But by what authority Reed assumed to act, even in this mechanical capacity, we are not informed, except by Mr. Frank, the plaintiff himself being constrained to admit that “I do not know who “selected Reed to operate that machine” (131-2). When Reed arrived on October 20th, the plaintiff “had “no arrangements at all about paying Mr. Reed for “the time he should be there: I did not trade with “Mr. Reed: *I did not consider Mr. Reed in it at all*” (136). Reed’s own explanation of his presence upon the Skinner premises is contained in the deposition taken by the plaintiff; and his story, as contained between pages 242 and 247 of the record, establishes that his functions there were purely mechanical: he was there “to install a mechanical milker”: it was “Skinner’s trouble with his cows” that brought him: he was “the expert in charge”: “Skinner stopped his

“ machine and I was sent for to restart it”: “I re-  
 “ started the machine”; and from October 20th to  
 December 20th, he was there “to take charge of the  
 “ mechanical milker”: “I operated the milker”. And  
 Reed claims that between October 20th and December  
 20, 1914, he “was working at that time for the Sharples  
 “ Separator Company” (246-7),—a declaration in which  
 he is flatly contradicted by the sales-manager of the  
 company. In this connection, Mr. Frank states: “I  
 “ know Albert J. Reed. He was with the Sharples  
 “ Separator Company as a milking machine expert for  
 “ a period of about nine months, and his employment  
 “ ended with us prior to October, 1914. I think he had  
 “ not been working for us for two or three weeks prior  
 “ to October 20, 1914; his account had been squared  
 “ up and been checked out. Mr. Reed was engaged to  
 “ install milking machines and to instruct the pur-  
 “ chasers of the same in their proper use. He worked  
 “ under the direction of the San Francisco office. He  
 “ might have been working for us some time in October,  
 “ but was not working for us on October 20, 1914, or  
 “ thereafter; I could not say how long before October  
 “ 20. My best judgment is that he was not working  
 “ for us for two or three weeks before the 20th of  
 “ October, 1914. I do not know whether or not Reed  
 “ went to the ranch of W. W. Skinner during the month  
 “ of October, 1914. Mr. Reed left the San Francisco  
 “ office, and it is my belief that he left for the W. W.  
 “ Skinner ranch. He came in to call upon me before  
 “ he went to the ranch of W. W. Skinner. I advised  
 “ Mr. Reed that if he would call upon Mr. W. W.  
 “ Skinner he could undoubtedly secure employment with



“ him as a milking machine operator; at that time Mr.  
 “ Reed was not in the employ of the Sharples Separator  
 “ Company. At the time when Mr. Reed was at the  
 “ ranch of W. W. Skinner in October, November and  
 “ December, 1914, I do not know in whose employ he  
 “ was; he was not in the employ of the Sharples Sep-  
 “ arator Company. I didn’t send Reed to the ranch  
 “ of W. W. Skinner, as an employee of the Sharples  
 “ Separator Company. On October 20, 1914, when  
 “ Reed went to the place of W. W. Skinner at El  
 “ Centro, Reed was no longer in the employ of the  
 “ Sharples Separator Company, and I gave him no  
 “ instructions as to what his future work would be,  
 “ but suggested to him that if he was looking for em-  
 “ ployment he could possibly obtain it from W. W.  
 “ Skinner. I did not give him any instructions to go  
 “ back to the Skinner place and restart the milking  
 “ machine and endeavor to get it running right, be-  
 “ cause he was not in the employ of the Sharples Sep-  
 “ arator Company” (353-4). The more the situation  
 of Mr. Reed is studied, the clearer becomes the propo-  
 sition that his duties were purely mechanical, and that  
 he was not invested by the plaintiff in error with any  
 authority whatever to bind it by any ex parte contract,  
 representation or declaration of his own.

Reed quit on December 20, 1914. Inquiry was then  
 made as to the declarations of Reed “at the time he  
 “ quit”; and over the objections and exceptions of this  
 plaintiff in error, the learned judge of the court below  
 permitted the inquiry, and the following occurred:

“Mr. SWING. Q. At the time Albert J. Reed quit, if he did, on December 20, state what, if anything, he said at the time he quit.

“A. When Mr. Reed quit?

“Q. Yes.

“Mr. PARKE. We object to that as incompetent, irrelevant and immaterial; and there is no evidence before this court of any kind, nature or description that Reed was agent of the Sharples Separator Company.”

“Said objection was then and there overruled by said court, to which ruling said defendant Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

“Exception Number 14-A.

“The WITNESS. A. The first intimation that I had that Mr. Reed was going to quit, I walked into the corral and there was one of the cows showed that she was not feeling good, and I was in a hurry and was going to the ranch, and I said, ‘Mr. Reed, is that cow sick?’ He said, ‘Look at her bag.’ And I just stopped, and it was a heifer and the bag was all swollen up, and I didn’t say a word, and Mr. Reed didn’t for half a minute, and then Mr. Reed said, ‘Skinner, I am going to quit; I have ruined the last cow with this machine that I expect to ruin’. He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made in my presence a statement to Mr. Edgar regarding his ability or inability to run the machine.



“The WITNESS (continuing). Reed quit. After he  
 “went in town, he sent Mr. Frank a telegram. I saw  
 “the telegram written; it was written by Mr. Reed.

“Q. Do you know his handwriting; are you able to  
 “identify that (handing paper to the witness)?

“A. It is very much like it. I believe it is.

“Mr. SWING. We offer now in evidence the copy  
 “written by Reed, which is attached to this deposition  
 “in which Reed testified in his handwriting, and which  
 “he wrote and also the original furnished by the com-  
 “pany, which is word for word like this. I offer the  
 “two.

“Mr. PARKE. We object to that as incompetent,  
 “irrelevant and immaterial; and further that no evi-  
 “dence is before the court that Reed was agent for the  
 “Sharples Separator Company, or any other employee  
 “at this time.

“Said objection was then and there overruled, by  
 “said court, to which said ruling said defendant  
 “Sharples Separator Company, a corporation, then and  
 “there duly excepted and now assigns the same as  
 “error.

“Exception Number 15.

“Mr. SWING. I will read this to the jury:

“‘Dated El Centro, California, December 18, 1914.  
 “‘(Reading.) Sharples Separator Co., 420 Mission  
 “‘Street, San Francisco. Have done everything pos-  
 “‘sible. Serious trouble started again. Taking too big  
 “‘risk to continue use of machine. We have dis-  
 “‘cussed every possible phase of situation, but quit  
 “‘milking, safest way, or we will have too big a loss,

“ ‘according to our agreement. Will await instructions  
 “ ‘here. Wire at once. Albert J. Reed’.

“ ‘Said telegram was then and there marked by the  
 “ ‘clerk as Plaintiff’s Exhibit 5’ ” (132-4).

Here and there, throughout the testimony of the plaintiff, references are made to Briggs, and in more than one place the names of Briggs and Reed are coupled together: but nowhere in this record is there a scrap of evidence to establish that the position of Reed was in any respect superior to that of Briggs, or that any authority was conferred by the company upon Reed which would give to his activity any wider scope than that of Briggs. The only evidence which we have as to the functions of Mr. Briggs is to be found in the explanation given by Mr. Frank. We are told by Mr. Frank that Briggs was employed by the company during 1914: “His position was milking machine expert. “His duties were to look after the milking machines, “their installation and troubles which customers occasionally have, and see that that particular line of “work was carried on properly, and to instruct the “dealers and agents in the proper use of the machine. He received instructions from me and worked “under my supervision” (252); and when the Skinner matter came up, Mr. Frank, instead of authorizing Mr. Briggs to bind the company by contracts, representations or declarations, “simply wrote or told Briggs “personally to follow out his usual custom or usual “practice in attempting to satisfy customers or to “correct any faulty installation, and find out what was “wrong and straighten out the trouble” (253). Mr.



Briggs visited the Skinner premises, and was instrumental in bringing Dr. Taylor there (177:189); as to this visit, Mr. Skinner's memory passed into occultation (152 *ad finem*). But the visits of Mr. Briggs developed action by the learned judge of the court below which was most prejudicial to this plaintiff in error; and in that behalf, the following occurred:

“After Reed left on the 7th of July, the milker was  
 “not run any more, and lay idle until the latter part  
 “of October. When Mr. Briggs appeared on the  
 “scene one day and told me he had come down to  
 “straighten up the milking machine business with me.  
 “I had never seen him before.

“The COURT. State what Briggs did.

“The WITNESS. I can't well state what he did  
 “without I tell you what passed between us. Briggs,  
 “he wanted to start the machine again and I would  
 “not agree with it.

“Mr. PARKE. We move to strike that out as to what  
 “Briggs wanted to do.

“Said motion to strike out was then and there  
 “denied by said court, to which ruling said defend-  
 “ant, said Sharples Separator Company, a corpora-  
 “tion, then and there duly excepted, and now assigns  
 “said ruling as error.”

“Exception Number 5.

“The COURT. Just what did you do?

“The WITNESS. I finally agreed that if they would  
 “take charge of the machine on 30 cows——

“Mr. PARKE. If the court please, we object to any  
 “agreements entered into by and between Skinner

“ and Mr. Briggs, or anything in the nature of a war-  
 “ ranty; this machine was sold on a written warranty;  
 “ Briggs had no authority to contract.

“ Said objection was then and there overruled by  
 “ said court, to which ruling said defendant, said  
 “ Sharples Separator Company, a corporation, then and  
 “ there duly excepted, and now assigns said ruling as  
 “ error.

“ Exception Number 6.

“ The WITNESS. Briggs wanted to start the machine.  
 “ I told him I would not let him do it. That was first.  
 “ He then came back again. He and I went to Mr.  
 “ Edgar Bros. and we came to an agreement. That  
 “ agreement was later put into writing; this is the  
 “ writing I entered into; my signature is at the bottom  
 “ there; that is my signature; this H. S. King is Mr.  
 “ Edgar Bros. man—I desired a witness. But for  
 “ my receiving this written paper, I would not have  
 “ allowed Reed to restart the machine.

“ Thereupon plaintiff offered in evidence a purported  
 “ agreement, to the introduction of which in evidence  
 “ said defendant Sharples Separator Company, a cor-  
 “ poration, objected as irrelevant and incompetent, and  
 “ incompetent as it involves representations other than  
 “ those appearing on the written guaranty. A ruling  
 “ upon the admissibility of said purported agreement  
 “ and the objections of said defendant Sharples Sep-  
 “ arator Company, a corporation, to the admission in  
 “ evidence of said document was by said court deferred  
 “ pending argument of counsel” (122-4). This pur-  
 “ ported agreement was as follows:



“October 20, 1914.

“The Sharples Separator Company do hereby agree  
 “ to furnish W. W. Skinner one Mechanical Milker Oper-  
 “ ator for two months more or less, Mr. Skinner to pay  
 “ him a salary of \$75.00 per month.

“It is further understood that Sharples Separator  
 “ Company are to pay Mr. Skinner for any damage  
 “ done to his cows by the use of the machine while  
 “ in the hands of their operator.

“It is also understood the Sharples Separator Com-  
 “ pany are to pay Mr. Skinner the amount of the  
 “ operator’s salary providing the machines are not a  
 “ success.

“SHARPLES SEPARATOR COMPANY,

“By F. L. Briggs.

“W. W. SKINNER.

“H. C. KING, Witness” (293).

Later, during the trial, the following occurred: “At  
 “ this point, the jury retired from the courtroom and  
 “ the court heard argument by counsel as to the com-  
 “ petency of the purported agreement alleged to have  
 “ been entered into in October, 1914, between the plain-  
 “ tiff personally and said defendant Sharples Separator  
 “ Company, a corporation, by one F. L. Briggs; and  
 “ said court then and there ruled that such purported  
 “ agreement was not competent evidence in this case  
 “ and sustained the objection made thereto by the de-  
 “ fendant Sharples Separator Company, a corporation”  
 (127). Notwithstanding this ruling, however, the  
 learned judge repeatedly permitted references to this  
 purported agreement, favorable to the plaintiff,

examples of which may be found on pages 128-9, 131, 172.

So far as Reed and Briggs are concerned, it may conservatively be said that this record discloses that neither Mr. Skinner, nor his wife, nor his son, establishes either the agency, or the scope of the agency, of either Reed or Briggs, so far as concerns this plaintiff in error. While Reed makes the claim that he was working for the plaintiff in error as a mechanical expert, especially between October 20th and December 20, 1914, and while this claim is strenuously repudiated by the sales-manager of the company, yet even Reed himself makes no claim that he possessed any authority whatever to bind the plaintiff in error by any contract, representation or declaration. The same is true of Briggs. There is no proof that either Reed or Briggs was in any way authorized to bind the Sharples Separator Company by any contract, representation or declaration: Reed was a mere mechanical installer or demonstrator, and Briggs was the same: the learned judge of the lower court refused to recognize any authority in Briggs to bind the Sharples Separator Company by his contracts or declarations; and it is impossible to perceive that the position of Reed was any more exalted or called for any different treatment.

It cannot be successfully denied that, prior to the advent of the Sharples Mechanical Milker, Mr. Skinner's animals had already suffered from garget; and his admissions of this to Reed, as grudgingly disclosed on pages 150-1 of the record, conclude the matter. In describing garget upon page 150, Mr. Skinner concedes



that “sometimes a cow’s bag will be swelled from that “cause”, and then goes on to make a somewhat attenuated distinction between “puffed” and “swollen”, claiming in substance that while his cows’ quarters might have been “puffed”, yet they were not “swollen”. Garget, however, is itself a form of mammitis, and may arise, *inter alia*, from failure to strip the animals, or from roughness in their handling (191); and while garget may be described as a traumatic or non-infectious mammitis in the absence of pathogenic infectious germs—such as may be engendered by insanitary surroundings—yet where that germ is present, the garget may well become an influential factor in the origination or transmission of infection. Unless infection be present, such as may be generated by insanitary conditions, the form of mammitis known as infectious or contagious cannot be caused by trauma or produced mechanically: upon this proposition, all are agreed. Dr. Taylor, a very capable man, tells us that “The infectious mammitis is so called from the internal invasion of the mammary gland by an invading organism. Sporadic mammitis may be caused by congestion due to a traumatism or a general fevered condition of the animal, such as sometimes arises shortly after calving, and produces what is commonly called ‘caked udder’ and ‘caked bag’. These two form of mammitis present practically the same outward symptoms, but the infectious mammitis is characterized by the presence in the udder of some kind of an invading organism, and it is spread through the herd from one cow to the other. Sporadic mammitis generally affects one animal or possibly two in a

“ large herd, is not characterized by the presence of  
 “ invading organisms in the affected udder and does  
 “ not spread from animal to animal” \* \* \* “The  
 “ Sharples Separator Company’s milking machine could  
 “ not, of or in itself, generate or cause infectious mam-  
 “ mitis, unless proper care as to washing and steriliza-  
 “ tion was not taken with the teat cup. It is not pos-  
 “ sible to mechanically produce infectious mammitis”.  
 “ \* \* \* “From my examination of the milk teats  
 “ and udders of Skinner’s cows, I do not think that  
 “ the diseased condition which I found was caused by  
 “ the use of the milking machine: I do not think so  
 “ from the fact that the examination of the milk showed  
 “ an infectious mammitis, as heretofore stated that the  
 “ milking machine could not cause the diseased condi-  
 “ tion which I observed at the time of my examina-  
 “ tion” (182, 184, 185-6). Dr. Hart states, “mam-  
 “ mitis is the general term covering all forms of inflam-  
 “ mation of the udder; it is generally considered an in-  
 “ flammation of the udder. There may be different  
 “ kinds of mammitis; they may be divided into garget,  
 “ or caked udder, mammitis or sporadic mammitis, and  
 “ infectious mammitis” \* \* \* “To settle the diag-  
 “ nosis of infectious mammitis requires the presence  
 “ of organism in the udder; no milking machine, nor  
 “ any mechanical process, nor handmilking, can cause  
 “ or create this organism. It is not possible to me-  
 “ chanically produce infectious mammitis—not without  
 “ the presence of the bacteria: bacteria may come from  
 “ the hand of the milker, or from the teat cup of the  
 “ milking machine, or from a pond in which the cows  
 “ are allowed to walk through, or may be in the corral



“ in which they are allowed to lie down,—the same as  
 “ any germ of any disease might get into the system”  
 (190, 191-2). Mr. Kelly explains that “Mammitis is a  
 “ general term for an inflammation of the mammary  
 “ gland—the glands that produce the milk—the bag in  
 “ general. Infectious mammitis is an inflammation that  
 “ sets up in the udder, due to the invasion of some  
 “ specific organism. All of the pus-producing organ-  
 “ isms, principally the micrococcus variety, are gener-  
 “ ally associated with infectious mammitis”. \* \* \*  
 “ Infectious mammitis almost invariably comes from  
 “ external sources. The organisms that are contained  
 “ in the udder are as a rule nonpathogenic, that is to  
 “ say, those that are not disease producing in habit;  
 “ that is, they are germs, but they are not such germs  
 “ as produce disease. A pathogenic germ is a germ  
 “ which must be or is actively producing and diseased.  
 “ In case of infectious mammitis, the organism invades  
 “ the udder through the teat ducts and is taken on to  
 “ the teat or through some abrasion of the udder from  
 “ some external source” \* \* \* “I do not think  
 “ there is very much doubt that in case a cow had  
 “ traumatic or non-infectious injury, and there was  
 “ present no pus generating germs, that upon proper  
 “ treatment of the cow, the quarters so affected could  
 “ be saved. My experience has been that traumatic  
 “ mammitis is very easily overcome by proper treat-  
 “ ment” \* \* \* “If no pus generating, or infec-  
 “ tion gets in, my experience is that the traumatic con-  
 “ dition can be cleared up; I never knew of a cow dying  
 “ from traumatic mammitis” \* \* \*.

“I understand the manner in which a Sharples  
 “ Milking Machine operates; in my opinion, the use of  
 “ a milking machine with reasonable care and prudence,  
 “ cannot cause infectious mammitis among a herd of  
 “ dairy cows upon which it was being used. I base  
 “ this view largely on the fact that I operated a  
 “ Sharples machine on a large herd for a period of  
 “ nearly two years; as to how large the herd was, at  
 “ present, we are milking a little over 200 cows, about  
 “ 206 cows; and it will be two years the first of De-  
 “ cember that I have been using the Sharples machine.  
 “ From my experience and observation, and use by  
 “ myself of the Sharples Mechanical Milker over a  
 “ period of two years upon a herd of cows as I have  
 “ stated, I think the machine can be used successfully  
 “ with cattle, without danger of injury to the cows pro-  
 “ vided the dairy man is careful in operating the same”  
 (209, 210, 211, 213-4). Mr. Van Denenden says: “I am  
 “ familiar with swollen bags of cows, and have had  
 “ occasion to treat them. I understand the theory and  
 “ method and operation of the Sharples mechanical  
 “ milker. My use of the Sharples mechanical milker  
 “ has extended over 16 months. I have seen it oper-  
 “ ated at more than one place. From my observation,  
 “ in my opinion, the use of the Sharples mechanical  
 “ milker, when properly operated, cannot injure the  
 “ cows upon which it is used” (225). Mr. Felch re-  
 marks on cross-examination that “In my opinion, it is  
 “ not possible to injure cows with the Sharples mechan-  
 “ ical milker producing a condition similar to mammitis,  
 “ if you use it according to instructions—I do not think



“it is” (229). Dr. Ridder was a veterinarian produced by the plaintiff. He never made any bacteriological test of the milk of Mr. Skinner’s cows, nor did he ever examine Mr. Skinner’s cows (272). His testimony in chief was very halting: he seemed to be obsessed by the phrase “local irritation”; and upon being asked a hypothetical question, itself open to criticism, gave the following dubious and conjectural replies:

“A. What was the primary cause?

“Q. The primary cause.

“A. My impression is it was simply an irritation—  
“local irritation.

“Q. Produced by what?

“A. Produced by—well, the milking machine; if it  
“was not the milking machine the hands would pro-  
“duce it, the same as the milking machine.

“Q. Would you say the cows had, under this state-  
“ment, infectious mammitis, or not?

“A. If they did, it was secondary, due to some pri-  
“mary cause” (271). On cross-examination, he ad-  
mitted that “if abscesses appeared in the cows re-  
“ferred to, belonging to plaintiff, and pus ran out of  
“the teats, and there was a complete sloughing away  
“of the whole quarter, I would certainly say that there  
“would be an infection present” (271); and then added,  
“You would have to have infection in order to have  
“pus. Such condition certainly could result from a  
“mere traumatic condition. The pus-producing organ-  
“isms are present in absolutely every case, in my opin-  
“ion, of normal conditions of the udder, and until the  
“udder is placed in a susceptible condition where the

“germs will enter abrasions through irritation, the  
 “udder has sufficient strength to resist infection until  
 “there is an irritation. It may be possible for a  
 “pathogenic micrococcus to attack a perfectly healthy  
 “tissue under a violent condition; but there must, in  
 “my opinion, be some infectious germ before it will  
 “result in the form of pus and the sloughing away of  
 “the quarters of the cow” (272). Dr. Cram, another  
 of plaintiff’s veterinarians, found pus in the teats of the  
 cows, concedes that it indicates the presence of a germ,  
 confesses that he made neither a bacteriological nor a  
 chemical analysis, and describes his opinion that the  
 germs from Skinner’s cows were staphylococci, as a  
 “presumption”—whatever that may mean. But Dr.  
 Cram, also, adheres to the germ theory and to the  
 doctrine of the transmissibility of bacteria from one  
 cow to another, and he admits that a traumatic condi-  
 tion, infectious germs being absent, is curable by proper  
 treatment. Dr. Daudy never examined or treated Mr.  
 Skinner’s cows, never visited Mr. Skinner’s place, and  
 never made a bacteriological examination of the milk:  
 he does not know what caused the injury: he does not  
 know whether Mr. Skinner’s cows had infectious mam-  
 mitis or not; and he was innocent of experience with the  
 disease, because “I never treated a herd which was  
 “afflicted with infectious mammitis” (280). But Dr.  
 Daudy admits that the micrococcus is an infectious germ  
 (278), believes that there was a bacterial infection, and  
 concedes that infectious mammitis will spread among  
 cows (280). And finally, Mr. McCulloch, though not  
 a veterinarian, was questioned upon this subject. He



never was at Mr. Skinner's place, nor did he ever see Mr. Skinner's cows (289) , and it is perhaps unnecessary to add that it nowhere appears that, assuming his competency to do so, he ever attempted any bacteriological or chemical analysis; and he concedes that he has no knowledge as to whether Mr. Skinner operated his machine in accordance with instructions. He states that mammitis is an inflammation of the mammary gland (281), and that it is caused by "any injury inflicted upon the cow's udder" (282),—a point of view which, in opposition to the views of other competent men, would limit the origin of mammitis to some traumatism. He states that non-infectious mammitis can be caused by the use of the Sharples Mechanical Milker (282), but this is an undraped pronunciamiento, clothed by not even a tatter of a reason. And after describing personal experiences peculiar to himself, he condemns the mechanical milker, "even though all the instructions furnished by the company are strictly followed" (285). And the scope of Mr. McCulloch's acquaintance with this subject may be exemplified by the following passage: "As to whether it is impossible for mammitis to develop other than by the use of a machine, when a milker gets so abusive that he hurts the cow he is not milking" (287). And while Mr. McCulloch claims that non-infectious mammitis can be caused by the use of a Sharples Mechanical Milker (282), yet he further concedes that "the operation of any mechanical milking machine cannot cause infectious mammitis" (289),—from which the conclusion is obvious that if these cows were afflicted with

infectious mammitis, their affliction could not have been caused by the mechanical milker, but must be ascribed to insanitary conditions, tainted water, uncleanness, etc.

Taking the plaintiff's own view, it is a postulate in this cause that pus had formed in the teats—that “the udders were rotten and had a bad odor” (121-2): as Skinner states, “practically every cow that I claim sustained personal injury had a pus formation in the bag; that pus was not good stuff; it ruined the bags” (151-2); and this feature of the situation is further described by Skinner at pages 159-160, where he tells us of the effect upon the milk. He describes, also, the general condition of the cows in terms which show the presence of something more than a curable, non-infectious, traumatic mammitis, saying, “they would get into very bad condition; the cow would stand with her eyes and head drawn; she wouldn't get about much; her general physical condition seemed to be affected. It affected the udder first, but after the infection had been there for a few days, it seemed to have a general depressive effect on the cow. The udder was swollen, and the cows act very much like the udder was sore to the touch. I judged from the manipulation that the udder was sore to the touch. There was discoloration of the udder; it looked bruised—the tender part of the bag, the bruised part of the bag; the affected part of the bag would look bruised; the trouble seemed to be—well, it looked bruised all over. There had not been any milk from the cows whose bags were affected” (159); and Reed



adds to this by remarking that "the whole udder was swollen, there was high fever and individual cows were in very bad condition" (249). And Dr. Taylor, in describing the condition of the animals observes: "I consider that the bacteriological examination which I made of the milk drawn from the four cows owned by Mr. Skinner showed that they were suffering from infectious mammitis, due to the presence of large numbers of micrococcus already referred to. I examined the udders of each of the four cows from which the milk was drawn. As already stated, one quarter of the udder of these four cows was affected with mammitis, the affected quarter being somewhat swollen, congested, hot and tender to the touch, and one quarter especially noted upon one of the animals contained a necrotic focus, a portion of which had sloughed out, producing a pit, from which pus was discharging. At the first attempt to draw milk from each one of these affected quarters, only a watery substance resembling whey was obtained, but upon manipulation of the udder a thick, semi-solid cheesy mass was obtained. As before stated, the first drawing of the milk was of a watery nature resembling whey. The milk drawn from the affected quarter had a sweetish, sickening odor \* \* \*.

"In my opinion, the diseased condition of the udders of these cows had not been properly treated, due to the fact of the sloughing in the one case already mentioned. If suitable antiseptic washes had been administered at the onset of this trouble, I do not think the condition that I saw would have been present at

“ the time I made the examination. I do not think that  
 “ the condition which I observed in the udders of these  
 “ cows could have been produced by injury, unless the  
 “ injured member was badly neglected and no treat-  
 “ ment given” (182-3). And so, Mr. Kelly tells us,  
 “ mammitis is a general term for an inflammation of the  
 “ mammary gland—the glands that produce the milk—  
 “ the bag in general. Infectious mammitis is an inflam-  
 “ mation that sets up in the udder, due to the invasion  
 “ of some specific organism. All of the pus-producing  
 “ organisms, principally the micrococcus variety, are  
 “ generally associated with infectious mammitis. Trau-  
 “ matic mammitis is caused by some superficial injury;  
 “ there is no pus-producing germ present in traumatic  
 “ mammitis. If a number of cows in a herd have  
 “ swollen quarters and the quarters are, in addition to  
 “ being swollen, sore to the touch and are discolored,  
 “ and in many instances abscesses form, and either the  
 “ quarters slough away through abscesses, or pus runs  
 “ out of the teat, and samples of milk from these cows  
 “ are taken, a bacteriological test or examination made,  
 “ and yellow micrococcus found, and an examination of  
 “ the milk taken from the cows shows that it has at  
 “ first, strains of a watery substance, and later a cheese-  
 “ like substance comes out, and it has a sickish, sweetish  
 “ smell, under those circumstances, I would look for an  
 “ infectious form of mammitis” (209-210).

In this connection, it is proper to point out that con-  
 tagious or infectious mammitis,—infection arising from  
 insanitary surroundings, tainted water, uncleanness,  
 etc., being absent,—cannot be caused by trauma or by



a mechanical process; and that the mechanical milker, being a mechanical process, will not, of itself, originate the affliction; and the cause of the affliction must be looked for elsewhere. Speaking to these points, Dr. Taylor states: "I do not think that the condition which  
 " I observed in the udders of these cows could have been  
 " produced by injury, unless the injured member was  
 " badly neglected and no treatment given." \* \* \* "I  
 " understand that the Sharples Separator Company's  
 " milking machine milks the cows by a process known  
 " as the 'vacuum process'; other than that I do not  
 " know the *modus operandi*. The Sharples Separator  
 " Company's milking machine could not, of or in itself,  
 " generate or cause infectious mammitis, unless proper  
 " care as to washing and sterilization was not taken  
 " with the teat-cup. It is not possible to mechanically  
 " produce infectious mammitis" (183-184). Dr. Hart's views may be gathered from the following excerpt from the record: "To settle the diagnosis of infectious mam-  
 " mitis requires the presence of organism in the udder;  
 " no milking machine, nor any mechanical process, nor  
 " hand-milking, can cause or create this organism. It  
 " is not possible to mechanically produce infectious  
 " mammitis—not without the presence of the bacteria:  
 " bacteria may come from the hand of the milker, or  
 " from the teat-cup of the milking machine, or from a  
 " pond in which the cows are allowed to walk through,  
 " or may be in the corral in which they are allowed to  
 " lie down,—the same as any germ of any disease might  
 " get into the system" (191-192).

“Q. In your opinion, Dr. Hart, after observing the  
 “ manner in which the Sharples Separator Company’s  
 “ milking machine operates and works upon the udders  
 “ of a cow, state whether or not, in your opinion, if the  
 “ machine is handled in a careful and proper manner,  
 “ it would result in producing infectious or non-in-  
 “ fectious mammitis?

“A. I have seen it operated without the production  
 “ of that disease; the likelihood of producing such dis-  
 “ eased condition would not be good; and if it were  
 “ handled properly it could be operated without any  
 “ infectious mammitis resulting.

“Q. State whether or not, in your opinion, if a  
 “ Sharples milking machine were used in accordance  
 “ with the book of instructions which has been furnished  
 “ to the plaintiff, and which you have examined, would  
 “ the operation of the machine under those conditions  
 “ likely result in 20 or 30 out of 90 cows becoming per-  
 “ manently injured for dairy purposes, by reason of the  
 “ sloughing of the bag, or the forming of abscesses  
 “ thereon?

“A. No, sir; it would not, if it was used by a man of  
 “ ordinary intelligence, particularly the owner of a herd  
 “ —the owner of the ranch, if he followed the instruc-  
 “ tions. For instance, there are men of the type of  
 “ milkers that are found around this country that even  
 “ though they thought they were following the instruc-  
 “ tions as given in this book by the Sharples Separator  
 “ Company, he wouldn’t be following those instructions,  
 “ and had no knowledge of mechanics, and that type of  
 “ men are not considered sufficiently capable of handling



“ a milking machine, even though they are capable of  
 “ hand-milking cows” (199-200). Mr. Kelly puts the  
 matter thus: “I understand the manner in which a  
 “ Sharples milking machine operates; in my opinion, the  
 “ use of a milking machine with reasonable care and  
 “ prudence, cannot cause infectious mammitis among the  
 “ herd of dairy cows upon which it was being used. I  
 “ base this view largely on the fact that I operated a  
 “ Sharples machine on a large herd for a period of  
 “ nearly two years; as to how large the herd was, at  
 “ present, we are milking a little over 200 cows, about  
 “ 206 cows; and it will be two years the first of Decem-  
 “ ber that I have been using the Sharples machine.  
 “ From my experience and observation, and use by  
 “ myself of the Sharples mechanical milker over a  
 “ period of two years upon a herd of cows as I have  
 “ stated, I think the machine can be used successfully  
 “ with cattle, without danger of injury to the cows, pro-  
 “ vided the dairyman is careful in operating the same.  
 “ I have operated that machine” (213-4).

“Q. You spoke of injured tissues being a better food  
 “ for infectious or pathogenic germs. I will ask you,  
 “ from your observation of the use of the Sharples  
 “ milking machine at various places, whether or not  
 “ it, if properly operated, injures the tissue of the  
 “ udder?

“A. It does not” (223).

Mr. Van Denenden stated: “I have been in a position  
 “ to observe whether or not it affects or destroys the  
 “ tissues, and injures the tissues. According to my  
 “ observation, it does not injure the teats or udders of

“ the cows. It cannot do it if you handle it proper. My  
 “ experience with the use of the machine has been for  
 “ 16 months. I got just as much milk from the cows  
 “ by milking with the machine as I did by hand; just as  
 “ much or more” (225). Mr. Felch also agrees: “From  
 “ my observation and experience, the Sharples mechani-  
 “ cal milker can be used upon a herd of dairy cows by  
 “ proper use and management, so as not to result in  
 “ injury to the cows; I know this from experience; I  
 “ have used it three years and had no injury to the  
 “ cows” (228). “In my opinion, it is not possible to  
 “ injure cows with the Sharples mechanical milker, pro-  
 “ ducing a condition similar to mammitis, if you use it  
 “ according to instructions—I do not think it is” (229).

Mr. Boarts, one of plaintiff’s Imperial Valley rebuttal witnesses, states that “In my opinion, the Sharples  
 “ separator machine was not a successful machine; the  
 “ machines under my observation have failed to milk  
 “ the cows without injury to the cows” (260): but how  
 much of this lack of success is to be attributed to the  
 machine itself and how much to the operator, Mr. Boarts  
 fails to state: he certainly does not attribute the entire  
 lack of success to the machine itself because when  
 asked on cross-examination, “If it had not hurt your  
 “ cows, you would have no complaint about your  
 “ machine and the way it operated” he replied “I am  
 “ not certain about that” (261); and in view of this  
 exhibition of titubation, we quite concur in Mr. Boarts’  
 declaration of non-infallibility (260). Between Mr.  
 Boarts and Dr. Ridder, there appears to be a schism.  
 The single concrete explanation offered by Mr. Boarts



for the lack of success of the machine was that “it did not draw the milk” (261); and although Mr. Boarts claims that the milker did not perform its mechanical functions all right, yet this is but an unexplained conclusion thrown in to impart an air of verisimilitude to an otherwise bald and unconvincing narrative,—indeed, Mr. Boarts was in no position which would authorize him to say in opposition to everybody else that the machine was mechanically wrong, because he confesses, that he was without knowledge of the subject-matter, saying “I am unable to state to the jury what part “ of the machine was wrong, or I would have corrected the trouble” (260-1). But while Mr. Boarts’ one asserted reason was that “it did not draw the “ milk”, yet, not only does Mr. Skinner concede that “ this machine would draw the milk out from the cows” (158), but no such reason was given by Dr. Ridder: here, the house became divided against itself; and Dr. Ridder takes the ground that the machine was not successful because it produces mammitis—“They were “ not successful on account of the irritation—the constant suction producing irritation on the udder; it “ hurts the cow’s teats; it sets up an inflammation—“ mammitis” (267)—a view quite out of line from the whole stress and burden of the testimony. It does not appear that Dr. Cram ever saw a mechanical milker in actual operation, or had any views to offer as to its success or failure. Dr. Daudy’s experience with the milker was “little” (277): he is even uncertain as to where he had it—“*I think* it was at Mr. Boarts’ “ ranch” (277): his understanding of the principle of

the machine is merely “rough” (id.): his knowledge as to the specific adjustments of the machine to the particular cow, is not original, but mere hearsay (278); and certainly a mental condition of this tenuity cannot impart any impressiveness to any opinion of his. But even Dr. Daudy does not agree that the machine was a failure, or that “it did not draw the milk”, or that it caused mammitis, or that it produced “an infectious “condition” (279),—the only view that he expresses being that the teat was “bruised” by the teat-cup—a mere trauma readily attributable to the inconsiderate action of two inexperienced boys. And the divergence of opinion among plaintiff’s witnesses upon this point becomes more accentuated when we turn to plaintiff’s witness McCulloch: the nebulous generality of Mr. Boarts that the machine did not properly perform its mechanical functions, is fully met by Mr. McCulloch’s statement that “my machine worked all right from a “mechanical standpoint; it was mechanically perfect” (289); and the preposterous claim of Dr. Ridder that the machine generated mammitis is overthrown by McCulloch’s statement that “The operation of any “mechanical milking machine cannot cause infectious “mammitis” (id.). It may not be improper to add that the depositions of five residents of Salt River Valley, near Phoenix, Arizona,—a valley whose climatic characteristics do not appear to differ from those of Imperial Valley (228)—supported the Sharpless mechanical milker and disclaimed injury to cattle from its use; and that the negative (*Paauhau S. P. Co. v. Palapala*, 127 Fed. 920, 925) depositions of five dairymen of Imperial Valley, who had used the milker for various



limited periods "from two weeks to a year" (291), were to the effect that *they* were unable successfully to operate the machine, or make it operate successfully (289-291). We submit that the inability of these Imperial Valley dairymen to accomplish a given result is no proof whatever that the result cannot be accomplished, if the proper course is pursued; and the mind harks back to the very suggestive criticism of Dr. Hart:

"Q. State whether or not, in your opinion, if a  
 " Sharples milking machine were used in accordance  
 " with the book of instructions which has been fur-  
 " nished to the plaintiff, and which you have examined,  
 " would the operation of the machine under those con-  
 " ditions likely result in 20 or 30 out of 90 cows becom-  
 " ing permanently injured for dairy purposes, by rea-  
 " son of the sloughing of the bag, or the forming of  
 " abscesses thereon?

"A. No, sir; it would not, if it was used by a man  
 " of ordinary intelligence, particularly the owner of a  
 " herd—the owner of the ranch, if he followed the  
 " instructions. For instance, there are men of the  
 " type of milkers that are found around this country  
 " that even though they thought they were following  
 " the instructions as given in this book by the Sharples  
 " Separator Company, he wouldn't be following those  
 " instructions, and had no knowledge of mechanics,  
 " and that type of men are not considered sufficiently  
 " capable of handling a milking machine, even though  
 " they are capable of hand milking cows" (199-200).

For a man injured as Skinner claims he was, he has exhibited extraordinary indifference, not only in pre-

senting his alleged grievances to the company, but also in presenting them to the courts. Briggs arrived at Skinner's place on October 20, 1914 (122, 167, 173): but although "before the time when Briggs came, there "were 20 cows ruined" (124), yet not one word of remonstrance reached the company—as Skinner puts it, "When Mr. Briggs came in the fall, I had not notified "anybody then" (162). Mr. Skinner claims that he make complaints to Edgar Bros., and to Reed or Briggs, but there is nothing to show that he ever followed up these alleged complaints: on the contrary, he never got into touch with any of the officers of the company until "After I discontinued the use of the machine" (162). Nor did Mr. Skinner exhibit any anxiety to seek redress by suit. The milker has not been operated since December 20, 1914 (134), but the complaint was not filed in the State court until July 6, 1915 (15)—over six months later; and while the alleged cause of action may not, perhaps, have been barred by limitations, yet this delay is among the items giving character to Skinner's attitude,—if he had really been griveously injured in the mode that he claims, one would have expected a prompter appeal to the courts.

When Skinner finally did appeal to the courts, he formulated his claims in his amended complaint. He sued both this plaintiff in error and the Edgar Bros. Company, claiming damages in the sum of \$4512. After alleging the corporate character and occupation of the Sharples Separator Company and the Edgar Bros. Co., Mr. Skinner describes himself as a farmer and dairyman in Imperial County, California, who, on



January 2, 1914, purchased a Sharples mechanical milker consisting of three milker units. He then alleges that “the defendants” \* \* \* “then and there warranted the same to be in all respects fit and proper for the said use of milking plaintiff’s said cows and especially warranted that when said Sharples mechanical milker had been installed on plaintiff’s ranch by defendants, it could be safely used for milking plaintiff’s said cows and that the use thereof in milking said cows would not in any way injure said cows nor decrease the amount of milk said cows would give if said mechanical milker was operated and cared for in accordance with defendant’s instructions” (60); he states that he had no information or knowledge concerning mechanical milkers other than the statements of the “defendants”; that he was without ability to ascertain the integrity of “defendants’” representations and warranties before buying, and that he believed the representations of “defendants”, relied upon “their” warranties, and made the purchase solely “by reason of said representations and warranties”,—this last allegation being, however, quite without support in the evidence, as we read the transcript. The installation of the mechanical milker on the plaintiff’s ranch is then described, and it is stated that the “defendants declared to plaintiff that the said mechanical milker was then and there completely and properly installed and that he could thereafter safely use and operate it for milking plaintiff’s said cows and that if operated and cared for in accordance with defendant’s instructions, the same

“ would not in any way injure plaintiff’s said cows  
“ nor decrease the amount of milk said cows would  
“ give” (61). The purchase of the fourth unit is then  
taken up by the plaintiff: he does not give us the date  
of the purchase, though he does tell us that “about  
“ May 6, 1914,” this fourth unit was delivered: but he  
does state that the purchase of the fourth unit was  
made “before plaintiff had discovered that said mechan-  
“ ical milker was injuring his said cows”; and he  
admits that after the delivery of this fourth unit,  
it was “thereafter operated together with the other  
“ three units, as one milker”. He claims, of course,  
that the same warranties and representations were  
made to him regarding this fourth unit as had been  
made to him regarding the original three units, an  
allegation which finds no support in the evidence, as  
we read the transcript. The plaintiff then goes on to  
describe his user of the mechanical milker, claiming  
that he operated it in strict conformity to and in  
compliance with all of “defendants” instructions: but  
alleges that the milker was not proper to be used for  
milking, and that the use thereof bruised and injured  
the teats, udders and bags of many of his cows, and  
greatly lessened the amount of milk given by them;  
and that as soon as he discovered that the milker was  
injuring his cows, he discontinued its use upon cows  
showing injury from its use. He claims that on  
May 30, 1914, he notified “defendants” of his effort  
to use the milker, but that the milker was insufficient  
and that “it did not in any respect comply with their  
warranties”,—an allegation which finds no support



in the evidence as we read the transcript, the plaintiff testifying that “when Mr. Briggs came in the fall (October 20, 1914), I had not notified anybody then” (162), although before the time when Briggs came, “there were twenty cows ruined” (124).

The planitiff then takes the position that his asserted notification of May 30, 1914, was productive of results so far as the company was concerned,—that this notification originated a certain action by the “defendants” which the plaintiff alleges in succeeding paragraphs of his amended complaint; and this, quite regardless of the fact that “when Mr. Briggs came in the fall (October 20, 1914), I had not notified anybody then” (162). The assertion of the plaintiff is that upon receiving this impossible notice of May 30, 1914, the “defendants” repeated their former representations and warranties and asserted that the mechanical milker had not been given a fair trial, and insisted that they, “defendants”, be permitted to operate the milker upon the cows, and again represented that if the milker were properly operated it would not in any way injure the cows: but how “the defendants” could have taken this position in consequence of the alleged notice of May 30, 1914, when the fact was that Mr. Skinner had not notified anybody prior to the advent of Mr. Briggs on October 20, 1914, is, we must confess, quite beyond our comprehension. However, Mr. Skinner goes on to say that on June 25, 1914, “the defendants themselves”, began to operate the milker and so continued for about two weeks, but were unable so to operate it as to avoid injuring the cows, but, on the contrary, “did greatly in-

“jure said cows and permanently ruined many of them “for any and all purposes whatever”, abandoning their attempt on July 7, 1917. It is then alleged that the plaintiff again notified “defendants” that the mechanical milker was useless, and offered to return it to them, and demanded that they return to him the purchase price and damages for injuries done by its operation:—an allegation which we find great difficulty in reconciling with Mr. Skinner’s sworn testimony that prior to the advent of Mr. Briggs he had not complained to anybody.

It is then alleged that about October 20, 1914, “defendants” again asserted that this mechanical milker was a proper machine, represented that it could be successfully operated, and insisted upon another trial, “and “again represented and warranted that the mechanical “milker would not in any way injure plaintiff’s said “cows and agreed to pay to said plaintiff all damages “caused his cows by said mechanical milker”. And here, too, the only apparent attempt to support this allegation is, as we read the record, to be found in what for brevity we may call the Briggs’ contract, a contract which was ruled out by the learned judge of the court below, and which will be discussed more at length hereafter. The plaintiff then tells us that he consented to another trial of the mechanical milker, and that on October 20, 1914, “defendants” again began its operation, and so continued until the 18th day of December, 1914. The plaintiff repeats his claim that the milker injured his cows and permanently ruined many of them for all purposes whatever. He tells us that on Decem-



ber 18, 1914, the operation of the milker was discontinued by "defendants", and the same has not been used since. He then claims, generaliter, that the mechanical milker was useless and of no value, and that on December 18, 1914, he notified "defendants" of the insufficiency of the milker, offered to return it, and demanded its purchase price and the damages sustained by him. He then proceeds to allege his damage, commencing with the claim that his herd was healthy, well bred and free from disease; and alleges that two of the cows died to his damage in \$300, five were ruined to his damage in \$675, ten were ruined for dairy purposes to his damage in \$370, ten more were injured to his damage in \$300, making his total damage aggregate \$2.005. He further alleges a loss of butter fat received from the cows amounting to 6000 pounds, to his damage in \$1500. And he further alleges that he paid "defendants" in the purchase and installation of the mechanical milker \$1007. He prays judgment therefor for \$4512.00, and his costs.

During the course of the trial, this complaint was amended by setting up that by reason of the injuries to his cows, the plaintiff was obliged to pasture eight of them for a period of twelve months to his damage in the sum of \$132.00, and six of them for a period of 24 months to his damage in the sum of \$288.00. and in this amendment it was further alleged that the reasonable value of the milker to the plaintiff was nothing whatever, but if it had complied with the warranty given at the time of the purchase thereof, it would have been of the reasonable value of \$1000. By stipulation entered

into during the course of the trial (128), this amendment, which was allowed over the objections of the present plaintiff in error, was agreed to be deemed denied.

In due time, the present plaintiff in error came in with its answer, the burden of which was a denial of the case sought to be made by the plaintiff in his amended complaint. The company admitted that about January 2, 1914, it sold to Mr. Skinner, under a contract in writing, a mechanical milker, consisting of three milker units, but denied making any warranty such as was claimed by Mr. Skinner. This answer then goes on and specifically denies the various claims and assertions contained in Mr. Skinner's amended complaint, and denies that Mr. Skinner paid for the purchase or installation of the milker the sum of \$1007, and denies his claim of damages for \$4512, or any other sum. This answer then sets up a further and affirmative defense to the amended complaint and to each and every of the allegations thereof. In that behalf, it is alleged:

“I.

“That prior to the commencement of this action defendant agreed to sell to plaintiff and plaintiff agreed to buy from defendant a Sharples milker equipment consisting of a pump and three units installed complete less transportation charges on outfit, power, belting, counter-shafting, etc., not included in said equipment; that it was further agreed by and between plaintiff and defendant that said sale was made with the understanding that the plaintiff would have the machine operated and cared for in accordance with defendant's instructions; that the machine would be kept in good order mechanically; that pressure and vacuum would be maintained in accordance with defendant's instructions; that the cows would be carefully and thoroughly stripped after each milking and that the machine would be thoroughly cleaned after each



milking and that all reasonable precautions tending to the production of clean milk would be observed.

“II.

“That thereafter defendant furnished plaintiff with instructions for the operation of said machines; that plaintiff failed to clean said machines after each milking and said plaintiff failed to observe reasonable precautions tending to the production of clean milk, and that plaintiff maintained and kept the said dairy, barn and premises in an unclean and unsanitary condition, and that if any injuries were inflicted upon the plaintiff’s cows as alleged in plaintiff’s complaint, said injuries were the result of the unclean and unsanitary condition of said barn and of said premises, and of the failure of said plaintiff to take reasonable precautions for keeping said premises in a proper and sanitary condition.

“III.

“That it was further agreed by and between plaintiff and defendant that defendant would replace any parts of said Sharples milker equipment found to be defective in workmanship or material, provided written notice thereof was sent to this defendant by the purchaser and said defective part was returned within one year from the date of said purchase; but that said defendant would not replace any parts found to be defective as a result of ordinary wear and tear, accidents, or abuse; that plaintiff failed to send defendant written notice of any defects in said machine due to workmanship or materials and that if any damages arose from the use of said machine said damages were caused by the abuse of said machine by plaintiff.”

The Edgar Bros. Company, the other defendant, also filed an answer wherein, after admitting its corporate character and occupation, and that “it handled the goods of the Sharples Separator Company”, it denied that at the time of any sale to the plaintiff of a mechanical milker, it handled or was engaged in selling the mechanical milker manufactured by the Sharples Com-

pany. And this answer then goes on and takes up the various allegations of the amended complaint, and denies the same.

It was upon these pleadings, that the trial was had. The case in chief on behalf of the plaintiff was sought to be supported by his own testimony, that of his wife, and that of his son. When the plaintiff rested, this plaintiff in error produced Dr. Taylor, an expert veterinarian professionally employed by the United States Government, and Dr. George Hart, likewise an expert veterinarian, and city veterinarian for the City of Los Angeles, and Mr. Lynwood Kelly, superintendent of the Shore Acres Dairy, Mr. Van Denenden, professional dairyman of Corcoran, California, and Mr. Felch, a professional dairyman of Salt River Valley, in Phoenix, Arizona, and also the testimony of Mr. F. L. Briggs, Mr. A. Edgar, president of the Edgar Bros. Company, and the deposition of Mr. Reed, taken for and on behalf of the plaintiff, and the testimony of Mr. Frank, salesmanager of the present plaintiff in error. In rebuttal, the plaintiff produced Mr. Boarts, an Imperial Valley dairyman, Mr. Nye, also an Imperial Valley man, and an inspector for the State Dairy Bureau, and Mr. Rogers, also an Imperial Valley man, who had been inspector for the State Dairy Bureau and county health officer, and Dr. Ridder, a veterinary, and also an Imperial County man, and Dr. Cram, a veterinary, and also an Imperial County man, and Dr. Daudy, a veterinarian, and also an Imperial Valley man, and A. G. McCulloch, another Imperial Valley dairyman. Depositions of five dairymen from the Salt River Valley, near Phoenix,



Arizona, commendatory of the mechanical milker, were stipulated into the record on behalf of the present plaintiff in error, showing their successful use of the Sharples mechanical milker; and on behalf of the plaintiff, the depositions of five other persons, all of whom were, like the plaintiff's other witnesses, Imperial Valley men, and all of whom were Imperial Valley dairymen, were stipulated in the record, to show their inability to operate the milker or make it operate without injuring their cows, and that they sustained a shortage of milk during the year of 1914, these dairymen using the milker for uncertain periods ranging from two weeks to a year. Certain paragraphs from the plaintiff's bill of particulars, were then read into the record. It was further stipulated that Mr. Skinner testified that \$480 was the reasonable market value which he placed upon the pasturage of the injured cows from the time of their injury until the time of their sale, and here, the testimony was closed. The trial resulted in a verdict for the plaintiff; and thereupon the present plaintiff in error sued out this writ.

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#### ASSIGNMENT AND SPECIFICATION OF ERRORS.

##### I.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that there is no evidence upon which said jury could find that the milking machine furnished by the defendant in said action, caused the injury shown to have been sustained by plaintiff's cows.

## II.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this (341): that the plaintiff failed to introduce any evidence from which the jury might determine the amount of injury or loss, if any, that was sustained by plaintiff from the use of the three units purchased from the defendant, and the one unit purchased from Edgar Brothers Company.

## III.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that the injury actually resulting to plaintiff's cows, and the consequent loss of milk, if any, was due to the invasion of an infectious disease, not produced or caused by the operation of the machine furnished by the defendants.

## IV.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this that the preponderance of the evidence shows that the plaintiff's cows were affected with an infectious disease, and that such infectious disease was not and could not have been caused by the operation of the milking machine furnished by the defendant.



## V.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the evidence does not show that the plaintiff was damaged in the amount found by the jury (342).

## VI.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that a large part of the damage sustained by the plaintiff's cattle resulted from a lack of proper care and treatment thereof by the plaintiff and that had said plaintiff treated said cows in a proper and careful manner, a large part of the injury sustained by said cattle would have been prevented.

## VII.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that the defendant committed no breach of warranty, and that whatever damage was suffered by the plaintiff was the result of other causes than the operation of the milking machine furnished by the defendant.

## VIII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against

the law and the evidence, because of errors of law occurring during the trial and excepted to by the above-named defendant and hereinafter included in these assignments of errors.

### IX.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, because of the insufficiency of the (343) evidence to justify said verdict and/or judgment, the particulars of such insufficiency being included in these assignments of errors.

### X.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, in this, that the preponderance of the evidence shows that the damage sustained by plaintiff's cattle resulted from the invasion into the udders of said cattle of an infectious disease, not caused by the operation of the milking machine furnished by defendant, and the jury were instructed by the court that the defendant was not liable for such damage resulting from such infectious disease.

### XI.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, in this, that the amount of damages awarded the plaintiff by the jury is excessive, and finds no support in the evidence, and is contrary to the instructions of the court, in that the jury in arriv-



ing at the amount of damages stated in its verdict awarded plaintiff damage not only for the injury sustained by his cattle, but also for loss of milk; and also allowed the plaintiff for the injury, if any, which resulted to his cattle from the use and operation of the fourth unit purchased by him from Edgar Brothers.

## XII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the (344) charge of the court to the jury in said action, in this, that the jury awarded the plaintiff damages which resulted from the use and operation of the fourth unit of the milking machine which was purchased from Edgar Brothers, in violation of the instructions of the court that the defendant was not liable for such damage.

## XIII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the court to the jury in said action, in this, that in arriving at the verdict the jury duplicated damages in allowing to the plaintiff full value for all cows claimed by him to have been injured, and also allowing to the plaintiff a sum of money for loss of butter fat, and for pasturage of his cattle after the alleged injury occurred, and in so doing the jury disregarded the instructions of the court, that it should not, in arriving at its verdict, duplicate damages.

## XIV.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against

the charge of the court to the jury in said action, in this, that the evidence shows that the damage resulting to plaintiff's cattle, and the consequent loss of butter fat or milk, if any, was the result of the invasion into the udders of plaintiff's cattle of an infectious disease, and under the instructions of the court the plaintiff was not entitled to recover anything for damages resulting from said cause. (345).

### XV.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the court to the jury in said action, in this, that the evidence shows that a large part, or all of the damages sustained by plaintiff's cattle, could have been prevented had the plaintiff given to said cattle prompt and careful treatment, and under the instructions given by the court the defendant could not be held liable for damages which might have thus been prevented by prompt and careful treatment of the cattle by the plaintiff.

### XVI.

Said court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“A lifetime study in the dairyman's interest enabled these experts to solve the apparently impossible problem of automatic or mechanical milking”.

“The gentle massage of the teat-cup with its uniform action induces the cows to let down the milk freely, a condition which frequently increases milk production”.



“The teat-cup with upward squeeze always is soothing, even tempered, never in a hurry. After drawing each squirt of milk it gently massages the cow’s teats, keeping the teats and udder of the most delicate or hardiest cow in a soft, cool, natural, perfect condition, free from congestion”.

“By the proper use of this all important feature, which is obtainable only in the Sharples milker, the teats and udder of either the most delicate or the most hardy (346) cows are kept in a soft, cool natural condition. Until we made this discovery, we never thought of offering a machine for sale, though long before that time we were owners of patents on the best pulsating suction milkers ever devised”.

“These statements merit special consideration. They are conservative—”

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said court, and said printed matter was then and there received and read in evidence to said jury, to which ruling and action of said court, said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

## XVII.

Said court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“The Sharples mechanical milker is quite different from others which give the teats an upward squeeze, which not only absolutely prevents all irritation of teats and udders but actually benefits the cows and improves the flow of milk”.

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said court and said printed matter was then and (347) there received and read in evidence to said jury, to which ruling and action of said court, said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

### XVIII.

Said court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“Q. Is it safe to milk high-grade cows with the milker? A. This question has already been answered pretty thoroughly. The high-grade cow is much safer when milked by the Sharples milker than when milked by hired help, and just as safe as when milked by the owner himself.

“Q. Does it not have a harmful effect on some cows? A. From our knowledge of what the milking machine has accomplished on the 80,000 cows upon which it is used daily, we know that the Sharples milker has a tendency to increase the production of milk. Of some cows it does not seem to increase the production, of others it increases it anywhere up to 10%.

“If the hand milkers have been poor, the Sharples milker practically always shows an increase in milk production. The reason for this is that the ‘upward squeeze’ keeps the teats in perfect condition. The cows are milked with an even and regular motion studied by us and made correct. If the hand milkers were very good it is probable that the machine will not be able to improve upon them; otherwise, the probabilities are that it will. We know



positively that the Sharples milker never has an ill-effect upon the cows, provided the machine is kept in reasonable (348) order, and we keep enough experts out on the territory to see that all dairymen do keep their machines in good order.

“There is not the least tendency to dry up the cows prematurely nor have any other harmful effect”.

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said court and said printed matter was then and there received and read in evidence to said jury, to which ruling and action of said court said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

## XIX.

Said court erred in receiving, and in denying the motion of said defendant to strike out, the following answer and statement of said plaintiff during his direct examination, to-wit:

“They was to send this demonstrator there once a month to go through my herd and see if everything was working all right”.

Said motion to strike out was made upon the grounds that the statement of the witness as to the duties on the part of said defendant, was incompetent; said statement and answer of said witness was then and there received and given in evidence to said jury, to which ruling and action of said court said defendant then and there duly

excepted; and said defendant now assigns said ruling as error (349).

## XX.

Said court erred in receiving, and in denying the motion of said defendant to strike out, the following testimony as given by said plaintiff during his direct examination as set forth in defendant's bill of exceptions, exception Number 5, as follows:

“The WITNESS. I can't well state what he did without I tell you what passed between us. Briggs, he wanted to start the machine again, and I would not agree to it.

Mr. PARKE. We move to strike that out, as to what Briggs wanted to do”.

Said motion to strike out was then and there denied by the court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

## XXI.

Said court erred in overruling defendant's objection to the following testimony as set forth in defendant's bill of exceptions, Exception Number 6, as follows:

“The WITNESS. I finally agreed that if they would take charge of the machine on thirty cows—

Mr. PARKE. If the court please, we object to any agreements entered into by and between Skinner and Mr. Briggs, or anything in the nature of a warranty; this machine was sold on a written warranty. Briggs had no authority to contract”.

Said objection was then and there overruled by the court, to which ruling said defendant, Sharples Sepa-



rator Company then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as (350) follows:

“The WITNESS. Briggs wanted to start the machine; I told him I would not let him do it; that was first; he then came back again; he and I went to Mr. Edgar Bros. and we came to an agreement; and we came to an agreement; that is the writing I entered into; my signature is at the bottom there; that is my signature; this H. S. King is Mr. Edgar Bros. man—I desired a witness; but for my receiving this written paper I would not have allowed Reed to re-start the machine”.

## XXII.

Said court erred in permitting the plaintiff to amend his complaint, as set forth in defendant’s bill of exceptions, Exception Number 7, as follows:

“The COURT. You may amend your complaint, if you wish to. The objection is overruled.

Mr. PARKE. Note an exception”.

To which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error.

## XXIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the plaintiff during his direct examination, as set forth in defendant’s bill of exceptions, Exception Number 8, as follows:

“Q. Did you suffer any loss as the result of the operation of this milker upon your herd in the quantity or amount of milk or butter fat you received from that herd?”

Said objection was made upon the ground that said (351) question called for a conclusion of the witness. Said objection was overruled by said court, to which ruling said defendant then and there noted an exception, and now assigns said ruling as error. Thereupon, the witness testified as follows:

“I did”.

#### XXIV.

Said court erred in denying defendant’s motion to strike out testimony as set forth in defendant’s bill of exceptions, Exception Number 9, which said motion is as follows:

“Mr. PARKE. The Sharples Separator Company, a corporation, moves to strike out all of the testimony of the witness on the value of the milk, as stating a mere conclusion”.

Said motion was then and there denied by the court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error. Said testimony so retained was as follows:

“The WITNESS. The milk that I lost by reason of this amounts, I think, to \$1500—the value of it”.

#### XXV.

Said court erred in permitting said plaintiff to file an amendment to his amended complaint, as to damages, as set forth in defendant’s bill of exceptions, Exception Number 10.

Said defendant objected to the filing of said amendment on the ground that it attempts to set out elements



of damage not set out in the original complaint, or in the (352) bill of particulars furnished by the plaintiff; and upon the ground that this defendant has had no opportunity of investigating the question of damage set out in the amendment; and that at this time the plaintiff should not be permitted to insert other and different claims for damages than those covered by his original bill of particulars and complaint.

Said objection was then and there overruled, by said court, and said amendment permitted, to which ruling and action of said court, said defendant then and there duly excepted and now assigns said ruling as error.

## XXVI.

Said court erred in overruling defendant's objection to the testimony as set forth in defendant's bill of exceptions, Exception Number 11, as follows:

“The COURT. Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?

MR. PARKE. I dislike to object to the court's questions but we object to the question as to the conditions under which he started the use of the machine”.

Said objection was then and there overruled by the court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. Yes, sir. In October the machine was used practically two months, and a man by the name of Reed operated it. I did not employ Reed. Mr. Reed came and took charge of the ma-

chine on a string of cows. Mr. Reed and (353) Mr. Briggs were there when the machine started, and they selected their cows that had not been injured, young cows, and then selected a herd that they thought the machine would milk. I don't know that they thought that. At least, they picked such cows as they wanted. I had nothing to do with it. I told them to pick the herd and get just such cows as they wanted. I had nothing to do with selecting the cows. The machine had gotten dirty. They took those things and boiled them, and put in new rubbers, and started them up on those thirty cows. Mr. Reed had absolute control of it. I had nothing to do with it at all. It had not been there but just a little *but*, and a cow came into the corral with one of those bad quarters. I had cows that had not been milked with the milker in that herd. There were two strings. Some of those cows had had a milker on them in June and July. I had cows that this milker was not put on at any time. It is a hard question to answer, how many. I had some young cows. No cows got diseased that were not milked with the milker. Up to July they milked all the cows with the milker. I had some cows that came in after that that were not milked with the milker, but they selected some of those cows that had come in, young cows, and put the machine on them in October and November. After October seven of the cows were hurt and some of them injured. I only claim those absolutely ruined for dairy purposes. Some of them were injured that I put in no claim for. And as to the value of those cows what I say were ruined, I would have to get my instructions out again to segregate those different cows'' (354).

## XXVII.

Said court erred in overruling defendant's objection to the testimony as set forth in defendant's bill of exceptions, Exception Number 12, as follows:



“Mr. SWING. Q. With reference to the guarantee which he gave you, or purported to give you at the time he consented to restarting the milker, I will ask you if at any time since you have ever received any notice or intimation from the company that that was not a valid contract or guarantee?”

Mr. PARKE. We object to the question—that a guarantee was given by Briggs; and if that alleged contract was not binding upon the company, it would not make any difference whether they ever repudiated it or not, if there was no consideration therefor”.

Said objection was then and there overruled by said court, to which ruling of the court the defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. They did not notify me”.

## XXVII.

Said court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, exception Number 13, as follows:

“The COURT. Did they ever notify you that Briggs was not their agent and had no authority to do what he did do?”

Mr. PARKE. We object to the question upon all of the grounds heretofore stated”.

Said grounds are stated in assignment of error number XXVII (355).

Said objection was then and there overruled by the court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now

assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. No, sir”.

### XXIX.

Said court erred in receiving, and in refusing to strike out the answer of the witness “No, sir” to the question, “Did they ever notify you that Briggs was not their agent and had no authority to do what he did do during the direct examination of said plaintiff”, as set forth in defendant’s bill of exceptions, Exception Number 14.

Said motion was made upon the grounds that no alleged contract by Briggs was binding upon the company, and that it would not make any difference whether the company repudiated it or not if there was no consideration therefor.

Said motion to strike out was then and there denied by said court, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

### XXX.

Said court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, Exception Number 14-A, as follows:

“Mr. SWING. Q. At the time Albert J. Reed quit, if he did, on December 20, state what, if anything, he said at the time he quit? A. When Mr. Reed quit? (356)

Q. Yes.

Mr. PARKE. We object to that as incompetent, irrelevant and immaterial, and there is no evidence before the court of any kind, nature or description,



that Reed was the agent of the Sharples Separator Company”.

Said objection was then and there overruled by the court, to which ruling said defendant, said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. The first intimation that I had that Mr. Reed was going to quit, I walked into the corral, and there was one of the cows showed she was not feeling good, and I was in a hurry and was going to the ranch, and I said, ‘Mr. Reed, is that cow sick?’ He said, ‘Look at her bag’. And I just stopped, and it was a heifer, and the bag was all swollen up. And I didn’t say a word, and Mr. Reed didn’t, for a half a minute, and then Mr. Reed said ‘Skinner, I am going to quit. I have ruined the last cow with this machine that I expect to ruin’. He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made, in my presence, a statement to Mr. Edgar regarding his ability or inability to run the machine.”

### XXXI.

Said court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, Exception Number 15, as follows:

“The WITNESS (continuing). Reed quit. After he went to town he sent Mr. Frank a telegram. I saw the telegram written. It was written by Mr. Reed.

Q. Do you know his handwriting, or are you able to (357) identify that? (Handing a paper to the witness.) A. It is very much like it; I believe it is.

Mr. SWING. We offer now in evidence the copy written by Reed, which is attached to this deposi-

tion, which Reed testified is his handwriting, and which he wrote, and also the original furnished by the company, which is word for word like this. I offer the two.

Mr. PARKE. We object to that as incompetent, irrelevant and immaterial, and further that no evidence is before the court that Reed was an agent for the Sharples Separator Company, or any other employee at this time”.

Said objection was then and there overruled by said court, to which said ruling said defendant, Sharples Separator Company, then and there duly excepted, and now assigns the same as error. Thereupon said copy and original was received and read in evidence to the jury as follows:

“Mr. SWING. I will read this to the jury:

‘El Centro, California, December 18, 1914, Sharples Separator Company, 420 Mission Street, San Francisco. Have done everything possible. Serious trouble started again. Taking too big risk to continue use of machine. We have discussed every possible phase of situation, to quit milking safest way, or we will have too big a loss according to our agreement. Will await instructions here. Wire at once. Albert J. Reed’.”

## XXXII.

Said court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, Exception Number 16, as follows:

“Mr. SWING. Was it started before or after that (358) written paper was signed by Mr. Briggs?

Mr. PARKE. We object to that. There is no evidence of a written contract of any kind.

The COURT. Objection overruled.

Mr. PARKE. Note an exception”.

Said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. After. Briggs was there for one milking, after Reed came, and then a time or two after; Briggs helped Reed to sterilize everything and get it milking. Reed operated it from October until just after Christmas, and while the machine was being operated something like seven or eight cases, I think, of swollen quarters developed. During that time no new cases of swollen quarters developed among the two strings that were being milked by him. As to what cows Briggs and Reed put the milker on when they started on October 20, they selected a string of good cows. I think they were mostly young cows that had not been used on the milking machine before. Some of the cows had had their first calves; I don’t know how many. As to what was the occasion of Reed’s quitting on December 20, why, when he came into the kitchen—he always came into the kitchen where I was—when he came in, he said he wasn’t going to put the milker on another cow; and I wanted to know why, and the words that he used was that he had ruined the last cow for use with a milking machine that he was going to”.

### XXXIII.

Said court erred in overruling the objection of said (359) defendant to the following question asked of said plaintiff when recalled as a witness in his own behalf for further redirect examination, as set forth in defendant’s bill of exceptions, Exception Number 17, as follows:

“Q. At the time, Mr. Skinner, you purchased the three units from Mr. Hickson representing the Sharples Separator Company, what, if anything,



was said by him as to the manner or way you could purchase another unit if you so desired?"

Said objection was made upon the grounds that said question was incompetent, irrelevant and immaterial and also sought to develop matters already testified to.

Said objection was overruled by said court, to which ruling of said court said defendant then and there duly excepted and now assigns said ruling as error.

Thereupon the witness testified as follows:

"A. Why, Mr. Hickson was there, with Mr. Edgar's man, and he told me any time I wanted another unit I could either order it through them or notify Mr. Edgar, and they would get the unit for me".

#### XXXIV.

The court erred in denying defendant's motion, as set forth in defendant's bill of exceptions, Exception Number 18, as follows:

"Thereupon the defendant, Sharples Separator Company, made the following motion:

"We desire to move for a nonsuit, on the ground that it appears from the evidence that the damage, if any, suffered, even under the testimony of the plaintiff, was for the indiscriminate use of the four units, and it further appearing from the evidence that one unit was purchased (360) from Edgar Brothers, and three from the Sharples Separator Company, and no evidence having been introduced, and no basis given upon which the jury or the court could arrive at the damage, if any, which ensued from the three units purchased from the defendant, Sharples Separator Company, or the damage which resulted from the unit purchased by the plaintiff from Edgar Brothers Company. Upon the further ground that the testimony as offered by the

plaintiff is not sufficient to support a verdict in his favor, there being no showing that the milking machine caused any damage to the cows”.

The COURT. I will overrule your motion. Exception granted”.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

### XXXV.

Said court erred in sustaining the plaintiff’s objection to defendant’s testimony, as set forth in defendant’s bill of exceptions, Exception Number 19, as follows:

“The WITNESS. I have seen a Sharples’ milking machine, and have seen them in operation. I have examined the udder of cows upon which the Sharples milking machine was being used. The last place I examined was at Westchester, at a dairy that is run at the experimental farm of the Sharples Separator Company. I was in Philadelphia this summer and went down there. I am not in the employ of the Sharples Separator Company. I simply went there to observe it.

“Q. State what you observed in the condition of the udders of those cows. (361)

Mr. SWING. We object to the question on the ground that the evidence as to how other machines worked is not admissible to show compliance with the warranty; and we object to the question on the ground as incompetent, irrelevant and immaterial, how some other machine worked, and on the additional ground that no foundation has been laid.

The COURT. I will sustain the objection as to the cows at Westchester, Pennsylvania.

Mr. PARKE. Note an exception”.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The following is the substance of the evidence rejected:

“The udders of those cows were in perfectly good condition, and free from disease and injury of any kind”.

### XXXVI.

Said court erred in sustaining plaintiff’s objection to the defendant’s testimony, as set forth in defendant’s bill of exceptions, Exception Number 20, as follows:

“Q. State whether or not during the year 1914 milk or any other dairy products from the Imperial Valley were permitted in the city of Los Angeles to be shipped here for consumption in Los Angeles City.

Mr. SWING. Objected to as incompetent, irrelevant and immaterial”.

Said objection was then and there sustained by said court, to which ruling the defendant said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error.

The following is the substance of the evidence rejected (362): “No, sir”.

### XXXVII.

Said court erred in overruling defendant’s objection to the following question addressed on cross-examination to the witness Dr. George H. Hart, as set forth in defendant’s bill of exceptions, Exception Number 21, as follows:



“Q. Doctor, assuming that the plaintiff in this case, in February, 1914, had a healthy herd of some 90 dairy cows, all of which had been entirely free from garget since the herd had been collected, that plaintiff then bought a Sharples mechanical milker, which was installed by an expert operator, furnished by the defendant company, who after installing the machine, instructed plaintiff, his son and hired man, in the care and operation of the milker and remained with plaintiff until he pronounced the machine properly installed and adjusted and plaintiff and his milkers proficient in the operation of the machine; that thereafter the machine was cared for and operated by the persons who had received instructions as aforesaid, and was cared for and operated in accordance with the instructions furnished by the defendant company; that after the milking machine had been so used on plaintiff's cows for about thirty days, said cows began developing swollen quarters; that the cows showing swollen quarters were promptly taken off of the milker and thereafter milked by hand, following which hand milking the swelling rapidly disappeared and did not reappear in the affected quarters, or in any other quarter of that cow, so long as she was milked by hand, or in the udders of any other cow in the herd, being milked by hand; that the cows (363) which were being milked by hand were subjected to the same conditions of feed, water, quarters, exposure, surroundings, and handling as were the cows being milked by the milker, i. e., all the cows whether milked by the milker or by hand, were subjected at all times to the same identical conditions and surroundings, with the one exception, that one part were being milked by the milker and the other part were being milked by hand, that notwithstanding which the cows which were being milked by the milker continued to develop swollen quarters so long as the milker remained in operation upon them, while those being milked by hand the existing swelling rapidly disappeared and did not reappear so

long as they were milked by hand; that on the 25th day of June, 1914, the defendant, the Sharples Separator Company, sent its expert operator to plaintiff's ranch and he took charge of all the plaintiff's cows and of the milking machine and after thoroughly disinfecting the machine and the premises, began milking all of the plaintiff's cows with the milker, including those cows which had theretofore had swollen quarters; that in a very short time the swellings reappeared in the cows which had theretofore had it, in an aggravated form, which became so intense in the case of about 17 cows, as to stop the passage of milk from the udders; that said expert operator stopped operating the machine about July 7, 1914, and the milker was not again operated until about October 20, 1914; that in said interval all the cows were milked by hand and during that time no new cases of swollen quarters appeared; that on October 20, 1914, the milker was again begun by the same expert operator, who had operated from June 25th to July 7th, and he continued operating it (364) on about 30 cows up until December 20, 1914; that the cows on which said milker was so operated were cows selected by said operator and which had not theretofore shown any udder trouble; that during those two months, between 8 and 12 of the cows being milked by the milker developed swollen quarters, that of the 60 odd remaining cows of the herd being milked during the same period by hand, developed no new cases of swollen quarters; that the cows which were being milked by the milker and the cows that were being milked by hand during said period, were subjected at all times to the same identical conditions and surroundings with the one exception, that the one part were being milked by the milker and the other part were being milked by hand; that said expert operator stopped operating the same machine on December 20, 1914, and the same has not since been operated on any of plaintiff's cows; that plaintiff has never had any such case or any similar case of



swollen quarters in his herd before beginning the use of the milker and there has been no case of swollen quarters in his herd since the milking machine quit, would you say, under those circumstances, that the condition referred to in the question, the udder trouble of Skinner's cows, was caused by bacteria in the first place, or by some injury from the milking machine?"

Said objection was made upon the ground that said question was incompetent, irrelevant and immaterial, and that it assumed conditions not pertinent and not in evidence.

Said objection was overruled by said court and said defendant then and there excepted to said ruling and now assigns said ruling as error.

Thereupon the witness testified as follows (365):

"A. Just what is the question,—whether the trouble was caused by the milking machine, or whether it was caused by bacteria?

Mr. SWING. Yes, sir; in the condition stated by my question.

A. The ultimate trouble was due to bacteria. The primary cause in this case, there being only part of the animals that were milked by the milking machine that were affected—is not that what your question said?

The COURT. That is what he states in his question.

The WITNESS (continuing). That in this case the milking machine could have provided a condition in the udder in this percentage of animals which may have been easy milkers or hard milkers, and as the rules of the company show, should be handled under slightly different conditions, but they may not have been so handled, or they may have been so handled, but nevertheless the milking



machine may have, under those conditions, produced a favorable field for these bacteria to multiply. They may have caused some kind of an injury, or some kind of a reduction of those tissues through the resistances which they ordinarily have. I am familiar with the instructions furnished by the Sharples Separator Company for the operation of their machine. I do not remember that I ever found in there any place where it said to boil the teat cups; it mentions putting them in an antiseptic solution, lime''.

### XXXVIII.

Said court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exceptions, Exception Number 22, as follows:

“The COURT. Now, if you operate this machine as (366) directed in this book, is it a successful machine? A. Yes.

Q. Would it hurt the cow's bag? A. No.

Mr. PARKE. Now, just explain on what you base your answer to the question asked by the court.

A. When the machines were installed in our herd, we had a book of instructions, and we followed it.

The COURT. I don't care anything about your herd. A. Well, those are the instructions.

Mr. PARKE. Well, if the court please, I insist that the witness has a right to give the reasons upon which he bases his answer, whether or not the machine is a success. He says it is a success, and he has a right to give the reasons upon which he bases that opinion.

Mr. SWING. Our objections to the offer as it now stands are that it does not include any offer to show that the conditions under which this machine was operated were similar or identical

with those under which the machine of the plaintiff was operated.

The COURT. Objection sustained.

Mr. PARKE. Note an exception''.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

### XXXIX.

Said court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exceptions, Exception Number 23, as follows:

“Q. State whether or not you got as much milk from a dairy herd of two hundred cows at the Shore Acres dairy as (367) you did from hand milking?

Mr. SWING. We object to that; it is incompetent, irrelevant and immaterial.

The COURT. Objection sustained.

Mr. PARKE. Note an exception''.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The following is the full substance of the evidence rejected:

“The WITNESS. A. Yes, sir.”

### XL.

Said court erred in sustaining the objection of said plaintiff to the offer of said defendant in evidence of the contract signed by Edgar Bros. Company by J. H. Edgar and marked “Defendant's Exhibit No. 2” herein as set forth in said bill of exceptions, Exception Number 24.

To the ruling of said court sustaining said objection, said defendant then and there duly excepted, and said defendant now assigns said ruling as error.

### XLI.

Said court erred in sustaining the objection of said plaintiff to the following question asked upon the direct examination of the witness Albert John Reed, as set forth in defendant's bill of exceptions, Exception Number 25, as follows:

“Q. Were they the same kind of machines that the plaintiff W. W. Skinner was using near El Centro?”

Said objection was based upon the ground that said question was incompetent, irrelevant and immaterial and called for the conclusion of the witness (368).

To the ruling of said court sustaining said objection, said defendant then and there duly excepted, and now assigns said ruling as error.

The following is the full substance of the evidence rejected:

“The WITNESS. A. Yes, sir.

### XLII.

Said court erred in overruling defendant's objection to the plaintiff's testimony as set forth in defendant's bill of exceptions, Exception Number 26, as follows:

“Mr. SWING. For whom did you install—for whom were you working when you installed the mechanical milker?



Mr. PARKE. We object to that question on the ground it is not proper cross-examination, and was not called for in the direct examination.

The COURT. Objection overruled.

Mr. PARKE. Note an exception."

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon said witness testified as follows:

"A. I was working for the Sharples Separator Company."

### XLIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in defendant's bill of exceptions, Exception Number 27, as follows:

"Q. How long have you been working for them approximately?" (369).

Said question was objected to upon the ground that it was not proper cross-examination, and was not called for in the direct examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. I started to work for them on the first of June, 1913, and continued to work for them until January 15, 1915."

## XLIV.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination as set forth in defendant's bill of exceptions, Exception Number 28, as follows:

“Q. About how many dairies are you acquainted with down there?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I am acquainted with some half a dozen down there.”

## XLV.

Said court erred in overruling the objection of said defendant to the question addressed to said witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 29, as follows (370):

“Q. Did you ever warn Skinner not to use water out of this water hole?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now

assigns said ruling as error. Thereupon the witness testified as follows:

“A. When I went down in June and July I did.”

#### XLVI.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 30, as follows:

“Q. What was done?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Boiled water was used then; he followed my suggestion.”

#### XLVII.

Said court erred in overruling said defendant's objection to the following question addressed to said witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 31, as follows (371):

“Q. How many times were you there, at Skinner's place?”

Said objection was based upon the ground that said question was not proper cross-examination.



Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Well, I have been there a dozen times, off and on. I was there first in the first part of February, and remained for twelve or fourteen days. The occasion of my being there at the time was to install a mechanical milker. I was next there in the latter part of March, or the first of April.”

#### XLVIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 32, as follows:

“Q. About how long were you there at that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Two or three milkings.”

#### XLIX.

Said court erred in overruling the objection of said defendant to the following question addressed to the (372) witness Albert J. Reed, on cross-examination, as

set forth in defendant's bill of exceptions, Exception Number 33, as follows:

“Q. What was the occasion of your being there that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Trouble.”

#### L.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 34, as follows:

“Q. What was the trouble?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Skinner's trouble with his cows.”

#### LI.

Said court erred in overruling the objection of said defendant to the following question addressed to the

witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 35, as (373) follows:

“Q. What was the occasion of your being called in?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows

“A. I was the expert in charge.”

### LII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 36, as follows:

“Q. An expert in charge for whom?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Sharples Separator Company.”



## LIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 37, as follows:

“Q. How long were you there at that time?”  
(374).

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I was there a couple of days, anyhow.”

## LIV.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 38, as follows:

“Q. And when were you next there, if you remember?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now

assigns said ruling as error. Thereupon the witness testified as follows:

“A. June 25th to July 7th.”

#### LV.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 39, as follows:

“Q. What was the occasion of your being there that time?”

Said objection was based upon the ground that said question was not proper cross-examination (375).

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Skinner stopped his machine and I was sent for to restart it.”

#### LVI.

Said court erred in receiving in evidence and in refusing to strike out the following answer given by said witness Albert J. Reed to the question:

“Q. What was the occasion of your being there at that time?”, addressed to said witness on cross-examination, as set forth in said defendant's bill of exceptions, Exceptions Numbers 39 and 40, as follows:

“A. Skinner stopped his machine and I was sent for to restart it.”

Said motion to strike out was then and there denied by said court, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

## LVII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 41, as follows:

“Q. You say you were sent to Skinner's place—by whom were you sent?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling (376) said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. The Sharples Separator Company.”

## LVIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 42, as follows:

“Q. When next were you there?”

Said objection was based upon the ground that said question was not proper cross-examination.



Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. October 20th to December 20th.”

### LIX.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 43, as follows: .

“Q. What was the occasion of your being there at that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns (377) said ruling as error. Thereupon the witness testified as follows:

“A. To take charge of the mechanical milker. I was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time I operated the milker.”

### LX.

Said court erred in receiving in evidence, over the objection of said defendant that the same was not proper cross-examination, the following portion of the testimony of said witness Albert J. Reed as given on cross-

examination, as set forth in said defendant's bill of exceptions, Exception Number 44, as follows:

“A. To take charge of the mechanical milker. I was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time, I operated the milker.”

Said court overruled said objection of said defendant, to which ruling said defendant then and there duly excepted, and now assigns the same as error.

### LXI.

Said court erred in receiving in evidence, over the objection of said defendant that the same was not proper cross-examination, the following portion of the testimony of said witness Albert J. Reed as given on cross-examination as set forth in said defendant's bill of exceptions, Exception Number 45, as follows:

“The WITNESS (continuing). Cows were milked by hand when I went there on my second visit; there were two or three that had swollen quarters, that were being milked by hand. On my third visit, some half-dozen cows, perhaps, (378) were being milked by hand. When I got there in June they were all being milked by hand. They had quit using the milker and I started it again.”

Said court overruled said objection of said defendant, to which ruling said defendant then and there duly excepted, and now assigns the same as error.

### LXII.

Said court erred in overruling the objection of said defendant to the following question addressed to the

witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 46, as follows:

“Q. After that, were any of the cows taken off for any reason and milked by hand?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Some dozen or so were taken off and milked by hand, and six or eight were isolated. I was in charge at that time, and this was done under my instruction”.

### LXIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 47, as follows:

“Q. For what reason?” (379).

Said objection was based upon the grounds, that it is not proper cross-examination, and is asking for the opinion and conjecture of the witness, and not for a statement of fact.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now



assigns said ruling as error. Thereupon the witness testified as follows:

“A. The condition of the cows warranted it”.

#### LXIV.

Said court erred in receiving in evidence and in refusing to strike out the answer of the witness Albert J. Reed to the question, “Q. For what reason” addressed to said witness on cross-examination as set forth in said defendant’s bill of exceptions, Exception Numbered 47 and 48, as follows:

“A. The condition of the cows warranted it”.

Said motion to strike out was made upon the ground that said answer of said witness to said question was not responsive.

Said court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

#### LXV.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 49, as follows:

“Q. What was the condition of the cows?” (380).

Said objection was based upon the grounds that said question was incompetent, irrelevant and immaterial, not proper cross-examination, and asking for the opinion

and conjecture of the witness, and not a statement of fact.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. The whole udder was swollen, there was high fever and individual cows were in very bad condition.”

#### LXVI.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed, on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 50, as follows:

“Q. How soon did this condition appear after you had started the milker upon them?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Directly.”

#### LXVII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination as set forth

in said (381) defendant's bill of exceptions, Exception Number 51, as follows:

“Q. After you started the milker on that string of 30, were any taken off and milked by hand?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Some two or three during the first two weeks, and then one or two as warranted, later on.”

#### LXVIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 52, as follows:

“Q. Why was the milker taken off these cows?”

Said objection was based upon the grounds that said question was not proper cross-examination, not having been brought out in a direct examination, and calling for the conjecture of the witness, and not for a statement of facts.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now



assigns said ruling as error. Thereupon the witness testified as follows:

“A. Owing to swollen quarters.”

### LXIX.

Said court erred in overruling the objection of (382) said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 53, as follows:

“Q. I will ask you if Skinner was getting as much milk in quantity in December when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. In my opinion he was not.”

### LXX.

Said court erred in receiving in evidence and in refusing to strike out the answer of said witness Albert J. Reed to the question: “I will ask you if Skinner was getting as much milk in quantity in December, when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used”,

addressed to said witness on cross-examination, as set forth in said defendant's bill of exceptions, Exceptions Numbered 53 and 54, as follows:

“A. In my opinion, he was not.”

Said motion to strike out was based upon the ground that said answer was not responsive, and was not based upon a statement of facts.

Said court denied said motion, to which ruling said (383) defendant then and there duly excepted, and now assigns said ruling as error.

#### LXXI.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 55, as follows:

“Q. And some quit giving milk in one quarter, and some in more quarters?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Yes.”

#### LXXII.

Said court erred in granting the motion of said plaintiff to strike out from the cross-examination of

the witness Frederick A. Frank, the following language as set forth in said defendant's bill of exceptions, Exception Number 56, as follows:

“And I believe that Reed notified Skinner of this fact, too.”

To said ruling of said court striking out said passage from said cross-examination of said witness, said defendant then and there duly excepted, and now assigns said ruling as error (384).

### LXXIII.

Said court erred in receiving in evidence, and in refusing to strike out from the direct examination of the witness, C. F. Boarts, as set forth in said defendant's bill of exceptions, Exception Number 57, the following language:

“He had a very good dairy house.”

Said motion was made upon the ground that said answer of said witness was a conclusion of the witness.

Said court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

### LXXIV.

Said court erred in sustaining plaintiff's objection to H. D. Nye's testimony, as set forth in defendant's bill of exceptions, Exception Number 58 as follows:

“Q. Is it not a fact, Mr. Nye, that dairy conditions in the Imperial Valley during the year 1914, or during the time when you were State dairy



inspector down there, were such that milk and dairy products were not permitted to be shipped from Imperial Valley into Los Angeles city for consumption?

Mr. SWING. Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

The COURT. Objection sustained.

Mr. PARKE. Note an exception."

The said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error. The following is the substance of the evidence rejected:

"The WITNESS. Yes, sir." (385)

## LXXV.

Said court erred in receiving in evidence and in refusing to strike out from the cross-examination of Dr. V. E. Cram, as set forth in said defendant's bill of exceptions, Exception Number 59, the following passage:

"I found pus in the teats of the cows; that indicates the presence of a germ. There are not two or three kinds of germs—noninfectious and infectious germs. The presence of pus indicates the presence of a germ; this germ was not an infectious germ; it is not a contagious germ. I did not make any bacteriological test of the germs from Skinner's cows. As to whether they were not staphylococci, streptococci or micrococci, which by the better authorities are held to be infectious. I presumed it was staphylococcus; I presumed it was; my opinion is a presumption, and I made no bacteriological or chemical analysis."

Said motion was based upon the ground that the answers of said witness as to causes were incompetent, as they appear as mere presumptions on his part.

Said court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

## LXXVI.

The court erred in overruling defendant's objection to plaintiff's testimony as set forth in defendant's bill of exceptions, Exception Number 60, as follows:

"Q. Doctor, assuming that a herd of dairy cows were being milked, one string by a Sharples mechanical milker, and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared among the cows milked (386) by the mechanical milker, and that when the condition so appeared the affected cows were taken off the milker and milked together with other cows, then being milked by hand, not being isolated, and that the milkers did not wash their hands between cows, that the cows milked by hand got well, and the swollen quarters did not spread to a single other cow being milked by hand. What would you say as to what was the cause of the swollen quarters?"

Mr. PARKE. We object to the question as assuming only a partial statement by the uncontradicted facts as presented by the evidence, it appearing clearly from the evidence that there was present in the milk from Skinner's cows certain germs designated as staphylococci, and it would be unfair to ask the witness the cause of such condition, without setting forth that condition. And, further, nothing is said about the manner in which the milking machine was operated.

The COURT. Well, I overrule the objection.

Mr. PARKE. Note an exception."

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I would believe the teats there were being bruised by the milker. I would not say, under the conditions stated in the question, that the swollen quarter was an infectious condition. I think that the cup on this teat has bruised the quarter. The reason I think so was because there was no spreading of the disease there originally, and as soon as they took the teat cup off and went to milking these cows by hand, why, the trouble disappeared. The primary cause (387) in my opinion, of the condition stated was the bruising of the teat cup—or the teat by the teat cup”.

#### LXXVII.

Said court erred in overruling the objection of said defendant to the following question addressed on direct examination to the witness A. G. McCulloch, as set forth in said defendant's bill of exceptions, Exception Number 61, as follows:

“Q. What are some of the causes of mammitis, if you can say?”

Said objection was based upon the ground that said question called for an expert opinion of the witness, no foundation having been laid therefor.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Any injury inflicted upon the cow's udder will cause an inflammation. I know the general



difference between infectious mammitis and non-infectious mammitis.”

### LXXVIII

Said court erred in overruling the objection of said defendant to the following question addressed to said witness A. G. McCulloch, on direct examination, as set forth in said defendant’s bill of exceptions, Exception Number 62, as follows:

“Q. I will ask you whether, in your opinion, non-infectious mammitis can be caused by the use of a Sharples Mechanical Milker in milking cows.”

Said question was objected to as calling for a conclusion, (388) no proper foundation having been laid, and as incompetent, irrelevant and immaterial, and because the circumstances and conditions under which the operation of the machine might be made were not stated in the question.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. It can.”

### LXXIX.

Said court erred in overruling the objection of said defendant to the following question addressed on direct examination to said witness A. G. McCulloch, as set forth in said defendant’s bill of exceptions, Exception Number 63, as follows:

“Q. Did you follow them in operating the milker?”

Said objection was based upon the ground that said question called for a conclusion of the witness.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I did.”

### LXXX.

Said court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, Exception Number 64, as follows:

“Q. I will ask you whether, in your opinion, the Sharples mechanical milker can be operated upon dairy cows in the Imperial Valley without seriously injuring some of (389) them?”

Mr. PARKE. We object to the question as calling for an expert opinion of the witness, no foundation having been laid, incompetent, irrelevant and immaterial, and presuming a state of facts not proven in this case at issue.

The COURT. The objection is overruled.

Mr. PARKE. We note an exception.”

And said defendant, said Sharples Separator Company, now assigns said ruling as error. Thereupon the said witness testified as follows:

“A. No, it cannot.”

### LXXXI.

Said court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, Exception Number 65, as follows:

“Q. What, in your opinion, would be the effect upon a string of dairy cows, if milked any considerable length of time with a Sharples mechanical milker, even though all the instructions furnished by the company were strictly followed?

Mr. PARKE. We object to the question as calling for an expert opinion of the witness, presuming a state of facts not proven in this case, and incompetent, irrelevant and immaterial.

The COURT. The objection is overruled.

Mr. PARKE. We note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon said witness testified as follows:

“A. It would eventually kill the cows if persisted in. (390) It would develop an inflammation, and the inflammation would only be increased and aggravated by the use of the machine, if persisted in.”

## LXXXII.

Said court erred in refusing to give to the jury the Instruction No. 11 as requested by the defendant and as set forth in defendant's bill of exceptions, Exception Number 66, as follows:

“If you believe from all the evidence that the plaintiff's cows were injured by the use of the milking machine furnished by the defendant, Sharples Separator Company while being operated in strict accordance with the instructions given to the plaintiff by the defendant, then you are instructed that the full measure of plaintiff's damage is the difference between the value of the cows before they were injured, and the value immediately after such injury resulted, and if such damage be allowed plaintiff is not entitled to recover anything



additional for care or keep of said cows, or for loss of butter fat therefrom.”

Which said Instruction No. II said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error (391).

### LXXXIII.

Said court erred in refusing to give to the jury Instruction No. III as requested by defendant and as set forth in defendant’s bill of exceptions, Exception Number 67, as follows:

“You are instructed that the plaintiff is not entitled to any claim for damages for loss of butter fat.”

Which said Instruction No. III, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

### LXXXIV.

Said court erred in refusing to give to the jury Instruction No. IV as requested by defendant and as set

forth in defendant's bill of exceptions, Exception No. 68, as follows:

“There is no evidence before the court as to the value of the pasturage claimed by plaintiff, and plaintiff cannot recover therefor.”

Which said Instruction No. IV said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the (392) presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

#### LXXXV.

Said court erred in refusing to give to the jury Instruction No. VII as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 69, as follows:

“If, from all the evidence, you believe that the plaintiff's cows had infectious mammitis, or any other infectious disease of the udder, and that such disease contributed to, or caused any part, or all, of the injury to the cows claimed to have been injured, then you are instructed that the defendant, Sharples Separator Company, cannot be held liable in damages to the plaintiff for such injury resulting from such diseased condition.”

Which said Instruction No. VII, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said instruction to said jury, the said defendant, in the

presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

### LXXXVI.

Said court erred in refusing to give to the jury Instruction No. IX as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 70, as follows (393):

“If you believe, from all the evidence, that plaintiff's cows had infectious mammitis, or other disease of the udder, and that with knowledge of the diseased condition the plaintiff used, or permitted the milking machine purchased from defendant Sharples Separator Company to be used upon the cows so diseased, you are instructed that the defendant Sharples Separator Company is not liable for the injury resulting from the use of the machine upon cows so diseased.”

Which said Instruction No. IX, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

### LXXXVII.

Said court erred in refusing to give to the jury Instruction No. XI, as requested by defendant and as



set forth in defendant's bill of exceptions, Exception Number 71, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows which resulted in the injury complained of by him, was a traumatic, noninfectious disease of the udder, known as ordinary garget, and that the permanent injury (394) to plaintiff's cows as claimed by him resulted from a lack of proper care and treatment of said cows by the plaintiff, then you are instructed that the defendant Sharples Separator Company cannot be held responsible for any injury or damage which might have been prevented by the proper treatment of the injured cows by the plaintiff."

Which said Instruction No. XI, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and in said ruling of said court, refusing to give said instructions to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

#### LXXXVIII.

Said court erred in refusing to give to the jury Instruction No. XII as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 72, as follows:

"You are instructed that your verdict in this case should be in favor of the defendant Sharples Separator Company."

Which said Instruction No. XII, said court then and there refused to give to said jury, and in failing so

to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its (395) verdict, then and there duly excepted and now assigns said ruling as error.

### LXXXIX.

Said court erred in refusing to give to the jury Instruction No. XIV as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 73, as follows:

“If you believe, from all the evidence, that any part or all of the damage to plaintiff's cows, from whatever cause, resulted from a lack of prompt, proper and careful treatment of said cows by the plaintiff, then you are instructed that for all such resulting damage the defendant, Sharples Separator Company, is not liable.”

Which said Instruction No. XIV said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

### XC.

Said court erred in refusing to give to the jury Instruction No. XV, as requested by defendant and as

set forth in defendant's bill of exceptions, Exception Number 74, as follows:

"If you believe, from all the evidence, that the death of the three cows, and the (396) diseased condition of the udders of the other twenty-four cows, resulted from the invasion into the udders of these cows of an infectious disease, then the defendant in this case is not liable to the plaintiff for such damage."

Which said Instruction No. XV, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

### XCI.

Said court erred in refusing to give to the jury Instruction No. XVI, as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 75, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows resulted from the negligent or improper use by him of the milking machine purchased from the defendant, then you are instructed that the defendant Sharples Separator Company is not liable for such damage."

Which said Instruction No. XVI, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected



(397) said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and assigns said ruling as error.

## XCII.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 76, as follows:

“This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and represented that if the same was operated according to its instructions it would not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as alleged in (398) the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint they are no more a party to this action, because as to them the action was dismissed.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

### XCIH.

The court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 77, as follows:

"The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some of his cows from about February 7, 1914, to July 7, 1914, and again from October 20, 1914, to December 20, 1914. Plaintiff claims that within about a month after the milker was started his cows began suffering from the effects of its operation and that his cows were injured as long as the milker was operated.

"If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow his damages in the sum which would be a fair compensation for the loss incurred by an effort in good faith to use the (399) machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and permitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker, including the representations made by the defendant company and its employees.

"The word 'fair' used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than 'full' or 'complete' compensation; it is used rather in the sense of 'just'."

And the defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

#### XCIV.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 78, as follows:

“The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said Sharples Separator Company guaranteed the machine to be in all respects as represented in its printed matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Separator Company during the (400) negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharples mechanical milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

#### XCV.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 79, as follows:



“You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company which is to be considered by you is the warranty contained in the original order, being plaintiff’s Exhibit 1, introduced in evidence; and you can take that with you to the jury-room, gentlemen, or any other exhibit you desire.

“You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that (401) time.

“Also that the detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which I have just specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

#### XCVI.

Said court erred in giving the following instruction to the jury as set forth in defendant’s bill of exceptions, Exception Number 80, as follows:

“The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the approximate result of the operation of said milker upon said

cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the (402) defendant company.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

#### XCVII.

Said court erred in giving the following instruction to the jury as set forth in defendant’s bill of exceptions, Exception Number 81, as follows:

“If you believe from all the evidence that plaintiff’s cows were injured by the use of the milking machine furnished by the defendant, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant, upon the plaintiff’s cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

## XCVIII.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 82, as follows:

"In estimating the value of the cows (403) that were injured the true measure of such damage is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instructions and now assigns as error the giving of said instruction to said jury by said court.

## XCIX.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 83, as follows:

"You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after his loss, and I give you these rules to govern you in allowing the damages:

"1st: Where a cow died, you shall allow for the use of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

"2d: Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured



for a reasonable length of time to determine that the cow would be of no (404) further use as a milk cow and until she was well enough to be disposed of for beef; than allow the difference between the value of the cow before she was injured and the value of the cow for beef.

“3rd: Where a cow was not destroyed as a milk cow, but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the cow before her injury, and the value of the cow as a milk cow after her injury.

“4th: Where a cow was not permanently injured, but was only injured for a time, you shall allow for loss of butter fat during the time she was injured and did not give her normal amount of milk.

“5th: If the machine did not produce as much milk when being used as if said cows had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat.

“In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows.”

Said defendant, in the presence of said jury and before it retired to consider its verdict, then and there (405) duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

C.

Said court erred in permitting to be rendered and in receiving the verdict of the jury in the above entitled

action; and to said verdict, and to the action of said court in permitting to be rendered and in receiving said verdict, said defendant then and there, upon the announcement of said verdict duly excepted, and now assigns said verdict and the action of said court thereon as error.

#### CI.

Said court erred in giving, making, rendering, entering and filing its judgment in the above entitled action in favor of the above named plaintiff and against the above named defendant.

#### CII.

Said court erred in not giving, making, rendering, entering and filing its final judgment in the above entitled action in favor of the above named defendant and against the above named plaintiff.

#### CIII.

Said court erred in giving, making, rendering, entering and filing its final judgment in the above entitled action in favor of said plaintiff and against said defendant upon the pleadings and record in said action.

#### CIV.

Said court erred in giving, making, rendering, entering, and filing its final judgment in said action in favor of said plaintiff and against said defendant, in this, that said final judgment was and is contrary to law and to the (406) cause made and facts stated in the pleadings and record in said action.

## THE BILL OF EXCEPTIONS.

By procuring the stipulation of December 29, 1916, and the order of court sanctioning it, and by approving the bill of exceptions and agreeing that it should become part of the record in the cause, defendant in error is estopped to attack the regularity of the bill: he cannot now take advantage, to the detriment of plaintiff in error, of a situation originated by himself for his own benefit; and it would be inequitable to permit him to assume a position inconsistent with said stipulation and order, to the prejudice of this plaintiff in error.

Upon the settlement of the bill of exceptions in the lower court, it was objected to the bill that it had not been presented to the learned judge below for settlement and signing, nor was the same settled and signed, within the time allowed by law or within the term of the court at which the trial was had and judgment rendered and entered; and since this objection will doubtless be renewed here, we desire to state the reasons, which, in our judgment, would seem to call for its disallowance.

The relevant facts are that the verdict was rendered and the judgment entered on October 13, 1916 (94-97). By an appropriate stipulation, entered into between the plaintiff and defendant below, and an order entered thereon, the time within which this plaintiff in error might prepare, serve and file its bill of exceptions was duly extended to December 5, 1916; and thereafter by similar stipulations, said time was further extended to December 23, 1916, on which



last mentioned day “the proposed bill of exceptions “ was duly served and filed” (353). The defendant below having thus accomplished all that was then required of it, it became the duty of the plaintiff below to prepare and present his proposed amendments to the proposed bill; and, with this object in view, and “*at plaintiff’s request*” (353), a stipulation was entered into extending plaintiff’s time to prepare, serve and file his proposed amendments, until Wednesday, January 31, 1917. This stipulation was dated December 29, 1916, and an order of court in accordance therewith was made and entered. The new term of court began on the second Monday of January, 1917, that is to say, on January 8, 1917; and therefore the effect of the stipulation, entered into “at plaintiff’s request”, and for his convenience, was that the bill of exceptions, although prepared, served and filed within the term at which the judgment was rendered and entered, could not, without a violation of the stipulation and order of court, be settled until the expiration of the time which the plaintiff had asked for and received. Thereafter, on December 26, 1916, counsel for plaintiff being present but not consenting, defendant’s counsel obtained from the learned judge below an order granting five days after the coming in of the proposed amendments within which to present the bill and amendments for settlement,—an order which, in the event of dissent from the proposed amendments is quite justified by Rule 25 of the Rules of Practice of the court below, which provides *inter alia* that:

“If amendments are served and filed within the time allowed, they shall be deemed assented to by the party proposing the bill, and may, in like time and manner, be presented to the judge for allowance, unless the said party, within three days after receiving a copy of such amendments, shall notify the opposing attorney of his dissent, and that at a time and place specified, not less than two nor more than five days distant, he will present the proposed bill and amendments to the judge for settlement, and in that case the bill shall be so presented.”

On January 31, 1917, at the expiration of the time sought for by plaintiff and obtained by him from defendant and sanctioned by order of court, the proposed amendments were served and filed. On February 3, 1917, in compliance with the aforesaid Rule 25, the defendant dissented from the proposed amendments, and gave notice to the plaintiff that on February 6, 1917,—a date “not less than two nor more “than five days’ distant” (Rule 25),—it would present the proposed bill and amendments for settlement. Accordingly, on February 6, 1917, the bill and amendments were presented for settlement; but although the defendant had throughout done all things required of it, and although the delay ensued at the request of plaintiff and for his convenience and accommodation, yet the objection was actually made that the bill was neither presented nor signed within the term. When the bill and amendments were presented on February 6, 1917, it appeared that certain corrections were necessary, and thereupon the learned judge below, plaintiff objecting, made his order granting additional time until February 10, 1917, to remedy the bill: but this time

turned out to be unnecessary, because, on February 8, 1917, the bill was stipulated to be correct, and on February 9, 1917, was signed by the learned judge and filed. The whole story is told between pages 353-357 of the record.

It must be obvious, we think, that, in the lower court, this plaintiff in error did everything in its power to comply with all relevant requirements, and completed and filed its bill of exceptions within due time for that purpose—within the term in which the judgment was rendered and entered; and upon the other hand, we think it equally clear that the act which carried the settlement of this bill over into the ensuing January term was the stipulation which originated with the plaintiff below, which was requested by him, which was signed for his convenience and accommodation and which was sanctioned by order of court. Can this defendant in error now be permitted to take advantage of a delay originated by himself? Is this plaintiff in error to be prejudiced by the inaction and failure of the defendant in error to propose his amendments within the term? Is a party litigant, who has in all respects complied with the law, and who is itself in no default and guiltless of laches, to suffer by the act of its opponent in procuring the term to pass without settling a bill proposed in due time? Is an extension of time beyond the term, sought for and obtained by defendant in error for his own convenience and accommodation, to be visited as a sin upon the head of this unoffending plaintiff in error? Is it in the power of one litigant to request, for his own benefit, an extension



of time beyond the term, and then, having taken full advantage thereof, seek to utilize that very extension to beat down the rights of his opponent? How can it be just that one should request and receive an extension of time, and then, when the extension has carried the further proceedings beyond the term at which the judgment was entered, take advantage of a delay caused by himself, and be heard to claim that the bill is bad because not settled within the term which his own requested extension overleaped? One's sense of natural justice instinctively rebels against such a doctrine, and we venture the assertion that no authoritative decision supporting it upon a similar state of facts can be produced. All over this country, the rule is settled that a valid stipulation concerning any matter properly before the court acts as an estoppel upon the parties thereto and is conclusive of all matters necessarily included in the stipulation (*Brooklyn Mg. Co. v. Miller*, 227 U. S. 194: *Grant v. Bank*, 232 Fed. 201: *Fortney v. Carter*, 203 id. 454; *Hotchkiss v. Bank*, 200 id. 299: *Meagher v. Galiardo*, 35 Cal. 602, 605-6: *Cooper v. Gordon*, 125 id. 296, 301-2: *Roth v. Superior Court*, 147 id. 604: *Haese v. Heitzeg*, 159 id. 569: *McCann v. McCann*, 20 Cal. App. 564; and see the authorities collected in 36 *Cyc.* 1292, n. 69, and in the annotations thereto issued for 1901-1913, and for 1914-1917). As observed in *Fortney v. Carter*, *supra*, "fairness" requires that a stipulation be not moved aside: as pointed out in *Grant v. Bank*, *supra*,

"This stipulation cannot be disregarded or varied. It was the solemn deliberate act of the parties. It was

the authority for all that was done; the court having sanctioned that disposition of the case" (207);

and in the cause at bar, as already pointed out, the stipulation was "sanctioned" by the order of the court below (354). And as observed in *Mcagher v. Gagliardo*, *supra*,

"agreements between parties of the character of which this case discloses, are not only agreements between the parties, but between them and the court, which the latter is bound to enforce, not only for the benefit of the party interested in their performance, but for the protection of its own honor and dignity".

Cf. *Smith v. Whittier*, 95 Cal. 279, 288.

It may be added that one who has with knowledge of the facts assumed a particular position in judicial proceedings, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party; under the operation of this rule parties to stipulations and agreements entered into in the course of judicial proceedings are estopped to take positions inconsistent therewith to the prejudice, injury or disadvantage of the party setting up the estoppel; and this doctrine is supported by an immense mass of authority, some of which may be cited (*Speake v. U. S.*, 13 U. S. (9 Cranch) 28: *Ohio Ry. v. McCarthy*, 96 U. S. 258: *Halliday v. Stuart*, 151 U. S. 229: *Robb v. Vos.*, 155 id. 13; *Davis v. Wakelee*, 156 id. 680: *Bank v. Brady*, 184 U. S. 665: *Valdez v. Central Altagracia*, 225 U. S. 58: Cf. *Wells v. Neiman-Marcus Co.*, 227 U. S. 469: *Schmidt v. Bank*, 234 id. 64: *Jones v. The St. Nicholas*, 49 id. 671: *Sullivan v. Colby*, 71 id. 460: *Houston*

*Bank v. Ewing*, 103 id. 168: *Mootry v. Grayson*, 104 Fed. 613: *The Triton*, 129 id. 698, 700; *Wilson v. Ry.* 129 Fed. 774: *Lumber Co. v. Blanks*, 133 id. 479: *Kansas etc. Ins. Co. v. Burman*, 141 Fed. 835, 842: *Shackleton v. Bag-galey*, 170 id. 57: *McNeil v. McNeil*, 170 id. 289: *Gering v. Leyda*, 186 id. 110: *Faenzer v. Ry.*, 191 id. 543: *Boynton Co.*, 211 id. 812: *Packing Co. v. Beshlin*, 211 Fed. 922: *Commercial Co. v. U. S.*, 217 id. 33: *Bravis v. Ry.*, 217 id. 234: *Sash etc. Co. v. Stitt*, 218 id. 1: *Mull v. Parrott*, 218 id. 713: *Nelson v. Hecksher*, 219 id. 679: *Oil Co. v. Shelton*, 220 id. 247: *Pindle v. Holgate*, 221 id. 342: *Boggs v. Bright*, 222 id. 714: *Lansingburgh v. McCormick*, 224 id. 874).

The principles just suggested are, it is submitted, controlling in the instant predicament, as may be illustrated by *Davis v. Patrick*. In that case, the delay in setting the bill of exceptions was caused by a stipulation of the parties which, like the stipulation here, presupposed the passage of the particular term during which the judgment was rendered and entered; and the manner in which the Supreme Court treated the situation is disclosed in the following excerpt:

“The plaintiff moves to strike the bill of exceptions from the record, for the reason that it was not allowed and signed in proper time. On the day the judgment was entered, June 25, 1883, a written stipulation between the parties was filed, providing that the defendant should have forty days to prepare and present to the court his bill of exceptions, and that the plaintiff should have twenty days thereafter to examine the same and make any suggestions of omission, addition or correction thereto. On the 16th of August, 1883, the writ of error was allowed and filed, a supersedeas bond, duly



approved, was filed, and a citation was duly issued, the writ of error being returnable at October Term, 1883. On the 14th of September, 1883, the following written stipulation, entitled in the cause, was made between the parties: 'The bill of exceptions in this case having been partially settled by His Honor, Judge Dundy, and he desiring to be absent from the district for a month or more, and being unable to settle the remainder of the bill before leaving, it is hereby stipulated that the same may be settled and signed at any time before November 1, 1883, and that the record may be filed in the supreme court by the first of December, 1883, with the same effect as if filed at the beginning of the October Term'. The term of the court at which the trial was had and the judgment rendered adjourned *sine die* on the 20th of October, 1883. The succeeding term of the court began on the 12th of November, 1883. The bill of exceptions was allowed and signed by the judge on the 8th of December, 1883, and was filed on the same day. The record was filed in this court on the 26th of December, 1883.

The point taken is that, as the bill of exceptions was signed after the beginning of the term of this court at which the writ of error was made returnable, and during a term of the circuit court succeeding that at which the case was tried, it cannot be considered. But we are of opinion that this objection cannot avail. The stipulation of September 14, 1883, shows on its face that the matter of the settlement of the bill of exceptions had been submitted to the judge, and that the delay was agreed to for the convenience of the judge. The purpose of the stipulation is that the bill had, with the knowledge of the plaintiff, been tendered to the judge for signature. This being so the consent of the parties that the judge might delay the settlement and signature did not have the effect to cause any more delay than would have occurred if the judge had delayed the matter without such consent. The defendant was not to blame for the delay beyond the time named in the stipulation. He appears to have done all he could to procure the settlement of and

signature to the bill, and he cannot be prejudiced by the delay of the judge. The bill of exceptions shows on its face that the several exceptions taken by the defendant were taken and allowed at the trial and before the verdict. The cases cited by the plaintiff—*Walton v. U. S.*, 22 U. S., (9 Wheat.) 651; *Ex parte Bradstreet v. Thomas*, 29 U. S. (4 Pet.) 102; *Sheppard v. Wilson*, 47 U. S. (6 How.) 260, 275; *Muller v. Ehlers*, 91 U. S. 249; and *Coughlin v. Dist. of Columbia*, 106 U. S. 7—do not contain anything in conflict with this ruling. It is supported by *U. S. v. Brietling*, 61 U. S. (20 How.) 252. The motion to strike out the bill of exceptions is therefore denied.”

*Davis v. Patrick*, 122 U. S. 138.

Approved in *Waldron v. Waldron*, 156 U. S. 361, 378, where the court said:

“The motion to dismiss or affirm is without merit. The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered, was lawful if done by the consent of parties given during that term.”

It may, indeed, be safely said that wherever there is an order of court, or an express consent, or such conduct as would equitably estop the opposite party from denying that he had consented, a bill of exceptions may be settled, signed and filed after the expiration of the term at which the judgment was rendered and entered (see in support of this, *inter alia*: *Ex parte Bradstreet*, 29 U. S. (4 Pet.) 102; *U. S. v. Brietling*, 61 U. S. (20 How.) 253; *In re Chateaugay Iron Co.*, 128 U. S. 544; *Ward v. Cochran*, 150 U. S. 597; *Freeman v. U. S.*, 227 Fed. 732, 740; *Lumber Co. v. Chapman*, 74 Fed. 450; *Gulf Ry. v. Jackson*, 64 Fed. 79). In *Ward v. Cochran*, *supra*, an order of court was



made during the judgment term continuing the cause for the purpose of settling the bill, and the bill was recognized although settled and signed after the term, and although “the defendant protested against the “ action of the court in extending the time and in “ allowing and signing the bill of exceptions after the “ expiration of the term at which the judgment was “ rendered” (150 U. S. 602 *ad finem*): in the cause at bar, the plaintiff below requested and obtained a stipulation extending his time to propose amendments, far beyond “the expiration of the term at which the “ judgment was rendered”; and upon that stipulation the lower court, without any protest from plaintiff, and in furtherance of the very stipulation that he had requested, made its order in accordance with the stipulation (353-4), whereby the settlement of the bill was deferred, not to the injury, but for the benefit, of the plaintiff: this order was made during the judgment term; and although, on February 6, 1917, after the plaintiff had accepted and received the benefits of the stipulation and order, and after the judgment term, in consequence of said stipulation and order, had expired, the plaintiff, like the defendant in *Wood v. Cochran*, sought to object to the doing of an act that he himself had delayed, yet we feel that the attitude thus disclosed will not escape the penetrating vision of this court. In the other cases cited, which are not all that might be cited, the view for which we contend is upheld: in *Gulf Ry. v. Jackson*, *supra*, the Circuit Court of Appeals for the Eighth Circuit held binding as a consent an indorsement approving a bill of excep-



tions, and that “the defendants in error ought not “to be permitted to revoke or evade it now”: in the cause at bar, it is agreed that the bill of exceptions is “correct” and that the same may be made a part of the “records in the above-entitled cause” (356); and an examination of the other cases will disclose either the absence of any order of court, or the absence of consent, or the absence of such circumstances as would make it inequitable to disregard the bill of exceptions. It is therefore respectfully submitted that the objections of the present defendant in error should not prevail.

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#### THE RULE AS TO ERROR.

If there be error apparent on the face of the record, a presumption of prejudice arises, which cannot be disregarded, unless the record affirmatively discloses that the error was not prejudicial.

In approaching the consideration of the errors which, with great respect but with equal firmness, we insist were committed by the learned judge of the court below, it may not be amiss to observe that it is the right of every litigant to enjoy a trial according to law—to have the same character of trial, governed by the same established rules of evidence and procedure as are applied in other cases. Due process of law is law in its regular administration through courts of justice (*2 Kent, Comm.*, 10); and as Justice Field said of the words “due process of law”, when applied to judicial proceedings,

“they mean a course of legal proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights”.

*Pennoyer v. Neff*, 95 U. S. 714.

“The meaning”, said Webster in his well-known definition of the phrase “the law of the land”,

“is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules that govern society”;

and, as observed in *Ex parte Wall*., 107 U. S. 265,

“in all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established usages and customs of the courts”.

Consequently, uniformity in the administration of justice is a fundamental right, and every litigant may demand that his case shall be tried by the same established rules of procedure and evidence as well as upon the same principles which are applied to other like controversies: to secure this uniformity is an important function of an appellate court: a litigant who has been denied a trial according to the law of the land has, in a legal sense, been aggrieved; and it is his right to bring his grievance to an appellate court to the end that it may be adequately redressed. And hence it is that, as far back as 1866, we find the Supreme Court of California defining substantial justice to be

“Such justice as the law administers *when correctly applied*, and not such as may be dictated by the abstract and varying notions of an individual as to what the equities of the case may be.”

*Stringer v. Davis*, 30 Cal. 318, 321.

In view of these considerations, it is with some confidence that we appeal to the proposition which is formulated as a syllabus to this section of this brief; and that confidence is strengthened by the unbroken line of authorities which support that proposition, some of which may here be cited (*Vicksburg Ry. v. O'Brien*, 119 U. S. 99: *Mexia v. Oliver*, 148 id. 664: *Choctaw Ry. v. Holloway*, 114 Fed. 465: *Chicago Wrecking Co. v. Birney*, 117 id. 811: *U. S. v. Gentry*, 119 id. 70, 76: *U. S. v. Hon. Plant Co.*, 122 id. 583: *Resurrection Mg. Co. v. Fortune Mg. Co.*, 129 id. 668: *U. P. Ry. v. Field*, 137 id. 14, 18: *Nat. Biscuit Co. v. Nolan*, 138 id. 6, 9: *Armour & Co. v. Russell*, 144 id. 614, 616: *Sparks v. Ferr*, 146 id. 371: *Inman Bros. v. Dudley Lumber Co.*, 146 id. 449: *Miller v. Ferr.*, 149 id. 330: *Sprinkle v. U. S.* 150 id. 56: *Cook v. Foley*, 152 id. 41, 48: *Mutual etc. Ins. Co. v. Heidel*, 161 id. 535: *Norfolk etc. Traction Co. v. Miller*, 174 id. 607: *Consul. Grocery v. Hammond*, 175 id. 641: *Stewart v. Brune*, 179 id. 350).

And we submit that the view which we are here urging is of special pertinency in a jury trial. As observed by the Court of Appeals of New York:

“Jury trials should be strictly confined to the issues made, and to the legitimate facts bearing upon them, and the practice of dragging in extraneous matters to influence the jury cannot be too strongly condemned. Upon a closely contested question of fact, slight influences may turn the scale, and every rule of propriety and justice demand that nothing outside of the legitimate facts should be introduced to affect the minds of those who are to decide the question.”

*O'Hagan v. Dillon*, 76 N. Y. 171-3.

And Cf. *Jamieson v. Elevated Ry.*, 147 id. 325.



## Insufficiency of Evidence.

THE EVIDENCE IN THIS CAUSE WAS AND IS INSUFFICIENT TO  
SUPPORT THE VERDICT OF THE JURY.

1. The Case, as Made by the Plaintiff Himself, Establishes That Any Damage Done Is Explainable, Not Upon the Theory That a Warranty Was Breached, but Upon the Theory That the Skinner Dairy Was Insanitary.

*Assignments 1, 3, 4, 6, 9, 10, 14, 15.*

The general statement of this case heretofore made goes into the insanitary condition of the Skinner dairy, and the details there referred to need not be repeated here. That general statement further establishes—and this is a matter of common sense—that insanitary surroundings not only originate, but also propagate, infectious and/or contagious diseases. And taking together all that we know of the dairy in question—its unprogressiveness, its disregard of the most ordinary precautions, its lack of a proper barn, its absence of proper flooring in the milking shed, its want of stanchions, its tainted water, its mud holes, its unclean cattle, its general dirt, etc.—it is impossible, we submit, to find in this record, as sustaining the plaintiff's theory, that satisfactory evidence “which ordinarily produces “moral certainty or conviction in an unprejudiced “mind”, and which alone will justify a verdict (Cal. Code Civ. Proc., Sec. 1835); and when we reflect that most of our information as to conditions upon this dairy was drawn from the plaintiff himself—who would not be human if he did not represent conditions in the light most favorable to himself,—our view that, if any damage was done to plaintiff's cows, such damage

cannot fairly be attributed to the mechanical milker, but must be treated as the inevitable consequence of the insanitary environment of the animals, becomes immeasurably strengthened. On the other hand, no witness in the case was able to point out, specifically and particularly, any defect in the milker *qua* machine: beyond generalities of the vaguest tenuity, no criticism was made of the machine that is worth a moment's consideration; and while it was agreed by the company that any defective part would be replaced without charge upon notice, etc. (114), yet, nowhere throughout this record, is it established that any notice ever was given by this defendant in error of any such mechanical defect. And if there be a fact thoroughly established in this cause, it is that infectious mammitis cannot be mechanically originated: the very nature of the complaint shows that this must be so; and no proof was anywhere made by plaintiff that this disease could arise in the absence of the infecting germ.

When, therefore, we are confronted with a case wherein, upon the one side, we find a grossly insanitary environment, and conditions such as may readily generate infection, and wherein, upon the other side, we have a milker mechanically free from defect and, of itself, incompetent to originate infection, it surely cannot be a matter calling for special intellectual penetration to perceive where the preponderance of the evidence rests: in such a case, but a single inference can be justified, and that inference absolves the milker from responsibility for the asserted damage. The burden of proof rested upon the plaintiff: it was his

duty, not to leave a jury to guess among conflicting conjectures, but to establish his cause of action by such satisfactory evidence as would generate moral certainty or conviction in an unprejudiced mind; and this, we submit, the plaintiff has failed to do.

And even if it be conceded, purely for argumentative purposes however, that the evidence in support of these two theories was evenly balanced—was as consistent with one theory as with the other, yet that would not help the plaintiff to satisfy the rule as to the burden of proof. It was laid down by the Circuit Court of Appeals for the Eighth Circuit that

“a theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. If the facts are consistent with either of two opposing theories, they prove neither.”

*U. S. Fidelity Co. v. Des Moines National Bank*,  
145 Fed. 273.

And in the cause at bar, where the cause of the damage to the cows is sought to be explained upon conflicting theories, plaintiff asserting that cause to be the mechanical milker, and defendant insisting that, *inter alia*, the cause was the wretched conditions upon plaintiff's dairy coupled with his failure to respect the “conditions of sale” of the milker (113-4), the evidence as to this cause was wholly circumstantial—was wholly a process of argumentative inference from the facts of a status to the cause of that status. Witnesses tell us of conditions at the dairy; they tell us of the mode



of user of the milker; they describe the condition of the water that the cows waded in, and that was used to wash dairy utensils; they tell us of the physical condition of the cows: but no witness is produced who can do more than state his opinion, inference or conjecture as to the cause being searched for.

In the cause at bar, the answer of the present plaintiff in error set up the unclean and insanitary condition of the plaintiff's premises, and the failure of the plaintiff to keep his premises in a sanitary condition, and any injuries inflicted upon plaintiff's cows were there assigned to this insanitary condition as their cause: no man, we submit, can read this record without perceiving that the insanitary condition claimed was made out; but while the plaintiff attempted to claim that the mechanical milker was the cause of the injuries to the animals, yet he made no real attempt to establish that those injuries were not caused by the unclean and insanitary condition of the premises; and where the surrounding circumstances are such as to leave it equally open to inference that the injuries were caused by the unclean and insanitary environment of the animals—where, in other words, the evidence fails to exclude causation other than the mechanical milker,—it cannot be said that the plaintiff has sustained the burden of proof impressed upon him by law. As observed by Justice Van Devanter in the case last cited:

“Passing, for the moment, the fact that Kelley neglected to make a daily count of the money in the reserve chest, it is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the

loss was occasioned solely by the personal dishonesty of one of the other employees, to whom the money in its exposed condition was easily accessible, as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelley. Which theory was correct was left to mere conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reasonably tending to establish the latter theory to the exclusion of the other, the guaranty company was entitled to a directed verdict in its favor. *Asbach v. Chicago etc. Ry Co.*, 74 Iowa 248, 37 N. W. 182; *Smith v. First National Bank*, 99 Mass. 605, 97 Am. Dec. 59; *Crafts v. Boston*, 109 Mass. 519; *Morley v. Eastern Express Co.*, 116 Mass. 97; *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *Ruppert v. Brooklyn Heights R. R. Co.*, 154 N. Y. 90, 47 N. E. 971; *Chicago etc. Ry. Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58. As was well said by the Supreme Court of Iowa in *Asbach v. Chicago etc. Ry. Co.*:

‘A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory.’

The case of *Smith v. First National Bank* is well in point. It was an action to recover the value of bonds deposited with the bank for safe-keeping and alleged to have been lost through its negligence. There was no evidence of negligence, except that which resulted by inference from the fact of loss, and the surrounding circumstances were such as to leave it equally open to inference that the bonds had been stolen by one of several persons who had access to the vault in which the bonds were kept. For a loss in the latter mode the bank was not responsible. The court, after observing that the plaintiff had the burden of proof, and that its evidence failed to exclude the possibility of loss by other means than negligence of the defendant, and left the

case to be decided by mere inference, without any facts to determine which inference was correct, said:

‘There being several inferences deducible from the facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is essentially wrong.’ ”

*U. S. Fid. Co. v. Des Moines Nat. Bank*, 145 Fed. 273, 279-280,

and see this case followed:

*Vernon v. U. S.*, 146 Fed. 121, 124.

## **2. The Amount of Damages Allowed Was Not Justified by the Evidence.**

*Assignments 5, 11, 13.*

In his charge to the jury, the learned judge of the court below limited the recovery of the plaintiff to the damages pleaded. He said:

“In regard to damages, I instruct you that the plaintiff sets out certain damages which plaintiff claims he is entitled to. He cannot recover any different or other damages than that specified in the amended complaint and the amendment thereto. These two papers you can have with you when you consult, if you so desire.”

What elements of damage, then, were “specified in ‘the amended complaint and the amendment thereto?’” An examination of these papers will disclose the following:



Loss caused by injuries to cows,	\$2,005.00
Loss of butter fat,	1,500.00
Loss caused by purchase and installation of mechanical milker,	1,007.00
Loss caused by pasturage,	420.00
	<hr/>
Total,	\$4,932.00

The verdict allowed damages in the amount of \$3763.92, but how this result was obtained we are at a loss to discover. Under Section 3281 of the California Civil Code, every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages; and as the same code provides (Sec. 3282), “detriment is a loss or harm “suffered in person or property”. Not only, then, does loss or harm constitute the basis upon which alone damages are recoverable, but the same code recognizes the three distinctive characteristics of the legal conception of damages, namely, proximateness, certainty and reasonableness. Thus, for example, in Section 3300, proximateness is recognized, just as that characteristic was recognized by the learned judge of the court below (298-9, 301): the principle that damages must be certain and clearly ascertainable, is incorporated into Section 3301; and the view that damages must be reasonable is adopted in Section 3359. There is, therefore, no right to damages where there is no “clearly ascertainable” loss: such loss must be, not only the natural, but also the proximate, consequence of the wrong (*Smith v. Bolles*, 132 U. S. 135); and,

necessarily, vague, indefinite, remote, consequential or uncertain results are not to be embraced within the compensation given by damages, because it cannot be certainly known that they are attributable to the wrong, or whether they are not rather connected with other causes.

The pleading of this defendant in error claims \$2005 for alleged injuries to his cows: the evidence produced in support of that claim is not free from ambiguity: but since the other objections to the amount of the award seem so convincing, it may perhaps be in the interests of expedition to direct attention to them. Take, for example, the item of \$1007 for loss caused by the purchase and installation of the mechanical milker: what does the record exhibit as to this? At page 140, the plaintiff states, "I paid to the Sharples " Separator Company for the three unit milking " machine the sum of \$461.46, as my check shows"; and \$461.42 was then the purchase price, and no greater sum. It nowhere appears that Mr. Skinner expended a single dollar for the "installation" of the mechanical milker: on the contrary, the contract provided in terms for "Units and Equipment *installed* " *complete* with instructions to my operators" (113); and Skinner tells us that the company complied with this requirement, saying that "the Sharples people sent " Mr. Reed to install the machine; he did so; he was " to install the machine and instruct my men and " me as to how to run and operate the machine, and " was to stay until he was satisfied and we were satis- " fied that we could operate the machine. He installed

“ the machine and proceeded to run it, start it up  
 “ and got it to going; and after the machine was  
 “ installed and we got everything going, he said he  
 “ thought the boys could run it all right with my  
 “ help and with assistance from the printed literature  
 “ he had left there with the different instructions he  
 “ left” (118). The purchase price being only \$461.42  
 “ as my check shows” (140), by what right, then, could  
 Mr. Skinner claim, or this jury allow, a single dollar  
 for “installation”? And yet, to account for this ver-  
 dict, an allowance for “installation” must have been  
 made.

It appears from Mr. Skinner’s statement that there  
 was an item of \$175.00 for an engine, and another  
 of \$370 for lumber, cement, lime and nails: it does not  
 appear whether the engine was new when he bought  
 it, or from whom he purchased it: but it does appear  
 that he procured the lumber, cement, lime and nails  
 from the Imperial Valley Lumber Company. So far  
 as these items are concerned, what “clearly ascertain-  
 able” loss has Mr. Skinner established as a basis upon  
 which to claim that he was damaged? In speaking of  
 these items, Mr. Skinner said: “I have set out in my  
 “ bill of particulars that I paid \$175 for an engine;  
 “ that was a gasoline engine; I still have that engine;  
 “ I am using it in running my separator; and I have  
 “ used it at all times to run my separator; I use it  
 “ because I had it and I could not dispose of it; I  
 “ never had one before I bought it to run this machine  
 “ with. I do not consider that it is worth anything



“ to me to run the separator with, because I have to  
 “ pay my men the same to separate it by hand; I  
 “ suppose it is of some value; it is in good shape  
 “ and was in good shape when I ceased using the  
 “ milking machine. I set out in my bill of particulars  
 “ that I expended \$370 purchasing lumber to build  
 “ stanchions for my cows; that was built for the pur-  
 “ pose of installing this machinery. I paid \$370 for  
 “ lumber to build stanchions with; I am using those  
 “ stanchions now; and I have continued to use them  
 “ ever since I installed them” \* \* \* “I have not  
 “ any check of the amount I paid the lumber company;  
 “ I bought the lumber from the Imperial Valley Lum-  
 “ ber Company; that lumber bill includes cement, lime  
 “ and nails. I put the cement underneath; I cemented  
 “ the floor where the cows stand, and that cement is  
 “ still there. It is not customary in Imperial Valley  
 “ for dairymen who desire to run a clean dairy to  
 “ cement their floors—it is not a custom; most of  
 “ them have just an ordinary dirt floor” (140-141).  
 And speaking of the same topic, Mr. Briggs testified,  
 quite without contradiction, “I have visited a great  
 “ many dairies throughout the country. The average  
 “ dairy is equipped with a cement floor and with  
 “ stanchions; and that is true whether they are using  
 “ a machine or not. I saw the gasoline engine which  
 “ Mr. Skinner was using on his place; I believe it was  
 “ an International. I am familiar with the value of  
 “ machinery such as gasoline engines, after they have  
 “ been used for a short period of time; I have sold  
 “ them. In my opinion, presuming that Mr. Skinner

“ paid \$175 for the gasoline engine in question about  
“ February 1, 1914, the value of that engine in use  
“ in December of that year would be fifty per cent,  
“ fifty cents on the dollar; I think I could sell it for  
“ that price. If a man were using it for separating  
“ milk from ninety cows, the value of it to the man  
“ so using it would be the price of it when new”  
(231-2). In view of these disclosures what loss has  
Mr. Skinner sustained that he should be permitted  
to claim, or the jury to allow, damages as for these  
items? Very obviously, the learned judge of the  
court below could see no damage to Mr. Skinner in  
this connection, because he told the jury that: “Plain-  
“ tiff claims damages in the sum of \$1007, being the  
“ purchase price and cost of installation of the milking  
“ machine purchased from the defendant Sharples  
“ Separator Company. It appears from the evidence  
“ that of said sum of \$1007, only \$461.42 was paid  
“ by the plaintiff to the defendant Sharples Separator  
“ Company for the milking machine containing the  
“ three units, and that the balance of \$1007 was for a  
“ gasoline engine, for the lumber to build his stan-  
“ chions, and for sand and gravel used by the plaintiff  
“ in making a cement floor for his milking shed. If  
“ your verdict in this case should be for the plaintiff  
“ and against the Sharples Separator Company, you  
“ are instructed that in arriving at the amount of  
“ damages to be allowed to plaintiff for moneys  
“ expended in the purchase and installation of the  
“ machine you should deduct from the said sum of  
“ \$1007 the reasonable value to the plaintiff of the

“ milking machine, of the gasoline engine so purchased,  
 “ of the stanchions so built, and of the cement floor  
 “ so installed by the plaintiff” (299-300). But any  
 presumption that the jury were guided by this instruc-  
 tion is repelled by the verdict which cannot be explained  
 except upon the theory that this instruction was dis-  
 regarded and an allowance made to the plaintiff for  
 these items.

And another reason why the amount of damages  
 allowed was not justified by the evidence is to be  
 found in Mr. Skinner’s claim of loss in butter fat. In  
 his amended complaint, Mr. Skinner puts this alleged  
 loss at \$1500: but the showing of fact sought to be  
 made to support this claim is of such a character that,  
 in our opinion, the entire item should be disregarded—  
 certainly, the jury had no coherent showing before them  
 upon which to make an intelligent award. For example,  
 in the amended complaint, Mr. Skinner claims \$1500,  
 but in his bill of particulars he exhibits figures which  
 are not without significance in the appraisement of this  
 claim. The following are the figures taken from the  
 bill of particulars:

1914, January,	1620 lbs. at 22¢	\$356.40
1914, February,	1493 lbs. at “	328.46
1914, March,	1925 lbs. at “	423.50
1914, April,	1975 lbs. at 25	493.75
1914, May,	1834 lbs. at 24	440.16
1914, June,	1377 lbs. at 26	358.02
1914, July	1732 lbs. at 25	433.00
1914 August	1683 lbs. at 25½	429.16
1914, September	1585 lbs. at 27½	435.87



1914, October,	1611 lbs. at 31¢	\$499.41
1914, November,	1482 lbs. at 34½¢	511.29
1914, December,	1469 lbs. at 30	440.70
<b>Total</b>		<hr/> \$5,149.72

And in speaking of these figures, Mr. Skinner states in his bill of particulars: "Herewith is given a list by " the month of the pounds of butter fat delivered to " Imperial Valley Creamery and Delta Creamery dur- " ing the year 1914, with the price per pound for " butter fat for each month. Plaintiff has not in his " possession at the present time a record of butter fat " given for the preceding year but knows that the " amount delivered by him to the creameries was less " in the year 1914 and 1915 than in 1913" (292-3).

It is to be observed that in the figures as we state them above no attention is paid to fragments of a pound except to this extent that where the fragment is less than half a pound it is disregarded, and where it exceeds half a pound the whole number is correspondingly increased. In the next place, the excerpt from the bill of particulars as printed in the record does not state the price per pound for the months of January and February, but in the figures as we state them in this brief that price is put at 22¢ per pound: there is no proof that we can recall of the price per pound during the two months mentioned, and we have been compelled to assume that the March price was a relatively probable one, especially in view of Mr. Skinner's attitude on this point as revealed

on page 137—he evidently thought that 22 cents was the January price. It is next to be observed that the figures given above are for the output of butter fat to December, 1914, only; and they do not profess to run to July 6, 1915, when this litigation originated in the state court. The mechanical milker was not used after December 20, 1914 (134): but, as Mr. Skinner tells us, “ I estimated the loss of butter fat up to the time this “ suit was brought; I computed the loss of butter fat “ right down to the date this suit was filed, in arriving “ at the \$1500” (138); and not only is there no more proof of the output of butter fat in 1915 than there was of the output in 1913, but also there was no proof whatever of any output at all during the first six months of 1915. And finally, it is not improper, in view of Mr. Skinner’s claims as to the alleged havoc caused by this wicked milker, to point out that the plaintiff’s own figures go far to refute his claims. He has told us in his direct examination that “up to June “ 25th, none of the cows had sustained any permanent “ injury” (120): yet the months of November and December show an output practically equal to that of February: the months of September and October show an output reasonably approximating that of January—when the wicked milker had not yet made its appearance; and the months of July and August, coming immediately upon the heels of the asserted “permanent “ injury” of June, show an output in excess of that of January, during which last mentioned month no milker was on the Skinner premises to be charged with derelictions of which it was innocent.

But, taking the year 1914 from January to December, the figures show that he received \$5149.72 for butter fat: still, *speculation and conjecture apart*, where is the *proof* that, if it had not been for the mechanical milker, he would have received the \$1500 additional that he now claims to have lost? In his bill of particulars, Mr. Skinner tells us that “plaintiff has not “ in his possession at the present time a record of “ butter fat given for the preceding year but knows “ that the amount delivered by him to the creameries “ was less in the year 1914 and 1915 than in 1913” (292): but if it be true that the amount delivered in 1914 was less than in 1913, why was not that fact established? Why was not some witness, some document, some circumstance produced in aid of this assertion? And if the 1914 delivery was less than that of 1913, why were we not told how much “less” instead of being left to grope among uncertainties? Certainly, if the 1914 delivery were seriously “less” than that of 1913, the plaintiff could and would have stated it, especially as in the “compilation” of the butter-fat record he had the assistance of counsel (137): but nowhere, conjecture apart, can any certain basis be found for this claim of \$1500. It is in this connection that an instance of Mr. Skinner’s failure to answer without evasion presents itself. Having admitted the unreliability of the figures set forth in that part of his bill of particulars which related to the butter fat, he was then asked the following question, and gave the following answer:



“Q. Then, what months are correct, except June, “as to the amount of butter fat which you sold from “your herd as nearly as you could determine it from “the records of the Creamery? A. Well,—yes” (138-9). The lucidity of this reply would have made Quintilian gasp and stare.

And what adds to the confusion and uncertainty, is the confession of the plaintiff that his figures are not correct. At page 138, he states: “The amount of “butter fat that I received each of the months of “1914, as set out in this bill of particulars, and the “price at which I sold butter fat those months, is “not correct for all the months”: under these circumstances, how could the rule that damages must be certain and clearly ascertainable have been respected by the jury? This, however, is not the only instance in which, in this very connection, Mr. Skinner has shown himself a misleading guide. At page 126, he declares that “in June and July my cream check dropped “\$142.13; it never did go back up again”. But in June, his cream check did not drop \$142.13: in July, his cream check did not drop \$142.13: his cream check did in fact go back up again; and with these exceptions, Mr. Skinner’s statement is trustworthy—is as reliable as many more. The plain truth, demonstrated from his own figures, is that in June, his cream check dropped \$82.14: in July, his cream check was increased by \$74.98; and from August to December, there was a constant and continuous increase in his cream check, the poorest months being August with

an increase of \$71.14 over June, and December with an increase of \$82.68 over June. Again, we ask upon what basis is this man's \$1500 guess to be considered as sufficient to authorize this jury to take away the funds of this company and give them to the plaintiff?

But this is not all: at page 126, still dealing with this \$1500 claim, he indulges in further conjecture, and says, "If they had not used this milker the cows "would, in my opinion, have held up": but what facts were either within his knowledge or laid before that jury to justify this speculation of our distinguished sanitarian? There were none, and such few relevant facts as may be extracted from the record show that no foundation for the statement existed. He claims that if they had not used the milker the cows would have held up: but, upon his own figures as given in his bill of particulars, the average monthly money return to the end of May, 1914, was \$408.45/100 per month, while the average monthly money return from the end of May to the end of December, 1914, was \$443.92/100 per month: did the cows "hold up"? And so, too, with the output in pounds: in January, 1914, before any milker ever appeared upon the premises, the monthly output was 1620 pounds, but the average monthly output for the rest of the year was 1650 pounds: did the cows "hold up"? And where is that certain proof of real damage required by law? The plain, unvarnished fact is that the solitary witness who assumed to deal with this \$1500 item was the plaintiff himself: none of the other witnesses had a word to say upon the subject; and the plaintiff's state-

ment (126) was not one of concrete fact, but a mere barren guess as to “the expected fruits of an unrealized “speculation” (*Smith v. Bolles*, 132 U. S. 125, per Fuller, C. J.: *Moulthrop v. Hyett*, 195 Ala. 493:). As we shall see hereafter, in another connection, damages are not to be determined by the opinions of witness; and as remarked by the Supreme Court, “the court “might properly decline to permit one of the defendants to testify in general terms what he estimated “the amount of their damages to be, when he had “not testified to the items of damage, or to any facts “upon which his opinion was based” (*Dushane v. Benedict*, 120 U. S. 630, 647). This, however, is precisely what Mr. Skinner was allowed to do; and it was all the more erroneous because he was giving his opinion, not as to a concrete actuality open to verification, but to a mere conjecturality. We respectfully insist that no proper proof of this \$1500 item was made, and that therefore it could not have been rightly considered by the jury.

Upon the whole, then, upon this branch of the case, we submit that, even allowing the claims of the plaintiff for injuries to the cows and for pasturage—claims which we deny and contest,—still, the amount of damages awarded by the jury was not justified by the evidence. The allowance made by the jury was \$3763.92: but reducing the \$1007 item to \$461.42, and eliminating the unproved \$1500 item, the outside allowance would be \$2886.42. But nothing here said should be taken as any concession by us that this plaintiff is entitled to any damages whatever: on the contrary, we insist that upon the whole case he is entitled to none.



3. **Assuming for Argumentative Purposes That the Record Discloses Damage, Yet No Verdict Against This Plaintiff in Error Was Justified, for the Reason That the Evidence Wholly Failed to Establish That Such Damage Was Caused by the Sharples Three Units, Rather Than by the Edgar One Unit.**

*Assignments 2, 11, 12, 33, 40.*

It appears from Mr. Skinner's testimony that, originally, he purchased three milker units, and, later, purchased a fourth unit. The original three units were purchased by him from this plaintiff in error under the instrument set out on pages 112-114 of the record: but the fourth unit was purchased by him from Edgar Bros. Co., which company was not, at the time of the purchase of this fourth unit, a selling agent for plaintiff in error (118-9: 232-3). Speaking of the purchase of this fourth unit, Mr. Skinner tells us: "We proceeded to milk the cows with the machine; "it took the milk away from the cows all right; and "after we had been running the machine some length "of time, I saw that the third unit was not practicable "for two men—the two men could take the two units "a piece and operate the two units; each man would "milk and strip his own cows and we could get along "faster; they could manage the work better; so I "went to Mr. Edgar Bros. and told him I wanted "another unit" (118-9); and in his amended complaint he states that the fourth unit was delivered about May 6, 1914 (61). In this amended complaint, Mr. Skinner alleges that the same warranties and representations were made regarding the fourth unit as had been made regarding the original three units:

but, as pointed out in our general statement of this case, this allegation is not supported by the evidence: on the contrary, Skinner tells us “I went to Mr. Edgar and he ordered the fourth unit for me; “there was nothing said about paying for the unit; “I just told Mr. Edgar to order the fourth unit for “me, and he did; this fourth unit was charged to me “by Edgar Bros. from whom I have received state- “ments for it. I did not communicate with any “officer or employee of the Sharples Separator Com- “pany when I bought the fourth unit,—I communicated “with no one except Edgar Bros.; I never received “any bill from Sharples Separator Company for the “fourth unit” (174).

It appears from Mr. Skinner’s story that, to use his own words, “I first began to use the machine “about the 7th of February, I think; and I think I “received the fourth unit from Edgar Bros. in May; “and I took the fourth unit from Edgar Bros. and “connected it up and used it after that—after May” (136): but, during the interval between February 7th, when he began the user of the three units, and May 6th, when the fourth unit was delivered (61), he had been, again to use his own words, “running the machine “some length of time” (118 *ad finem*). During this period, however, according to the allegations of his pleadings and the burden of his testimony, he had been “running the machine,” without mishap or trouble. In his amended complaint, he tells us plainly that the purchase of the fourth unit was made “before” any discovery by him of injury to his cows by the

original three units: if, by this language, he means to intimate that there might have been some undiscoverable injury, it is evident that such injury, if it existed at all, was sufficiently infinitesimal to be invisible: indeed, it would be most extraordinary if during this period any injury to those cows could have escaped the attention of Skinner, or his wife, or his son, or his hired young man; and if, as Skinner claims, the herd was “a selected herd of cattle that I had “been selecting for since 1911, I began on that herd “and I had been cutting out the poor milkers until I “had built up an extra good herd of cattle” (111), that he “had been selecting for since 1911” (id.), it would be to overleap the bounds of human credulity to suppose that, if the original three units were really, prior to the purchase of the fourth unit, injuring these selected cows, Skinner, the dairyman, could or would have failed promptly to discover that fact. And the view that trouble among the cows followed upon the purchase of the fourth unit, finds confirmation in Skinner’s suggestive statement that “I had been running “the machine; the fourth unit came; trouble *began* “to develop; my cows *began* to have swollen quarters; “and by swollen quarters I mean one teat, two teats, “three teats and sometimes four” (119). On this same page, he indulges in the somewhat contradictory and unspecific statement that “before this fourth unit “came this trouble began to develop”; and while at another place hereafter referred to, he repeats this contradiction, yet the burden of his testimony makes it quite clear that, during the three months time when



he operated the original units, and before the appearance of the fourth unit, he had no real grievance based upon injury to his cattle. Thus, on page 120, he tells us that "up to June 25th, none of the cows had sustained any permanent injury"; and on page 136, he speaks of having had "other trouble before I got the fourth unit", but as to the character or extent of that trouble he has nothing to say. At page 144, he makes this statement, "I had trouble with quite a number of my cows which were in a diseased condition, and had caked udders before I connected the fourth unit, not before I had ordered it; I could not tell you the number, but I should say 15 or 20 cows were affected before I put the fourth unit on": but if 15 or 20 cows were diseased and had caked udders before he connected the fourth unit, why did he connect it? Does he mean that he continued to milk diseased cows? He nowhere claims more than 100 cows: at page 111, he speaks of "85 to 100 cows": the fourth unit made its appearance on May 6, 1914: on page 139, he tells us that "in June, 1914, we were milking 100 cows"; and as he states on page 120, "up to June 25th, none of the cows had sustained any permanent injury": how can he expect to be taken seriously in the declaration that, before he connected the fourth unit, 15 or 20 cows "were in a diseased condition and had caked udders"? At page 147, he tells us that "I had ordered this fourth unit, and it came: I ordered it before I had any serious trouble"; and at page 151, *ad finem*, in speaking of "the 20 cows", he plainly shows that, according to his claim, they

were injured in June and July, long after the appearance of the fourth unit. And finally, in his bill of particulars, a carefully drawn document in the preparation of which he enjoyed the advice of counsel, he confesses that “all four units were in use before any “ of plaintiff’s cows were seriously injured” (291). Taking together, then, the whole of his statements upon this matter, we submit that no serious injury accrued to any of the plaintiff’s cattle until after the fourth unit entered “in use”.

From this discussion of the evidence, it is clear that a period of about three months intervened between the purchase of the original three units from the plaintiff in error and the fourth unit from the Edgar Bros. Company: that with the purchase of this fourth unit, the plaintiff in error had nothing to do: that the plaintiff in error made no warranty or representation of any character concerning this fourth unit; and that the evidence in the case throws no light upon the history or antecedent environment of this fourth unit itself—what its characteristics were, where it had been kept, what degree of care protected it, whether it was exposed to infection, or to contagious influences,—all this and more, is left undisclosed by this defendant in error who, in the court below, was seeking to impress upon the plaintiff in error a liability for damages. And in the next place, taking together all of the relevant testimony, it is quite clear, as the plaintiff himself is compelled in his deliberate bill of particulars to confess, that no serious injury accrued to any of his cattle until after this fourth unit entered

into use: it was only after the fourth unit entered into use that serious trouble "began to develop" (119).

But this is not all. It appears from the record quite unmistakably, that, after the receipt of the fourth unit, it was used generally and indiscriminately among the cows. Upon this proposition of fact, there can be no rational dispute. Thus, on page 136, Mr. Skinner tells us: "as to what cows I used the fourth unit on, " I used the fourth unit the same as the others. The " four units, as nearly as a man could look at them " and say, were identically alike; if a man was to " hand that unit up and another unit up, he could " not go and pick out which were those units. I " kept no record of the cows upon which the particu- " lar units were used. I did not make or keep any " record of the amount of milk obtained from each " individual cow" (136). This plain statement is emphasized upon the recross examination of Mr. Skinner at page 165, where he says: "When Mr. Reed " went down in October, he only used two units at a " time on the 30 that were set aside, and the other " two units were not used; Mr. Reed may have used " all four of them; I don't know which ones he did " use" (165). And finally, not to multiply references, the following passages from Mr. Skinner's bill of particulars are relevant and conclusive: "7. All four " units were in use before any of plaintiff's cows were " seriously injured. The four units were used indis- " criminate,ly, so that it is impossible for plaintiff to " itemize the injury caused by the original three units " as distinguished from that caused by the fourth



“unit purchased by plaintiff after the installation of  
 “the machine. No record was kept of the amount of  
 “milk each cow gave.

“19. No information can be given as called for by  
 “Demand No. 19, owing to the fact that no record  
 “was kept of the effect of the use of the three units  
 “purchased from defendant as contradistinguished  
 “from the effect of the fourth unit subsequently pur-  
 “chased but will say that approximately twenty of  
 “plaintiff’s cows were ruined from the use of the  
 “four units between the 25th day of June, 1914, and  
 “the 7th day of July, 1914. The last half of Demand  
 “No. 19 appears to be repetition of Demand No. 17  
 “and the answer thereto has hereinbefore been given”  
 (291-2).

What, then, was the situation presented to the jury?  
 Did the evidence discriminate between alleged damage  
 claimed to have been done by the Sharples three units,  
 and that done by the Edgar one unit? The case, as  
 made by the plaintiff, showed that the fourth unit was  
 received some three months after the original three  
 units, from a wholly different company which was not  
 then a selling agent of the present plaintiff in error,  
 and unaccompanied by any warranty or representation  
 of any character: that it was only after the receipt of  
 this fourth unit that, to quote again Mr. Skinner’s  
 language, “trouble began to delevop”; and that, again  
 to use Mr. Skinner’s language, “all four units were  
 “in use before any of the plaintiff’s cows were  
 “seriously injured. The four units were used indis-  
 “criminately, so that it is impossible for plaintiff to

“ itemize the injury caused by the original three units  
 “ as distinguished from that caused by the fourth  
 “ unit purchased by plaintiff after the installation of  
 “ the machine”. Under these circumstances, how was  
 it possible for that jury intelligently to say that the  
 asserted damage accrued from the use of the original  
 three units rather than from the admitted indiscrimi-  
 nate use of the fourth unit, upon whose advent only,  
 “ trouble *began* to develop? Prior to the advent of  
 this fourth unit, as Mr. Skinner is constrained to  
 confess, no serious injury had accrued to any of his  
 cows: judging from the facts before us, if that fourth  
 unit had not been put into operation, there would have  
 been no trouble—*certainly, there is no proof that it*  
*did not cause the trouble that Mr. Skinner complains of;*  
 and the trouble that he speaks of may perfectly well  
 be traced to the intervention of that fourth unit, in  
 which event no verdict against the present plaintiff  
 in error would have been justified by the evidence. To  
 employ the language of Mr. Justice Shiras, it was the  
 duty of the jury, if the defendant below were liable  
 at all, to find and measure the amount of damage  
 for which such defendant was legally liable: but that  
 jury could not, in the absence of evidence measuring  
 or showing the amount of damage for which the  
 defendant below was legally liable, have intelligently  
 performed this duty (*Boston etc. Ry. v. O’Reilly*,  
 158 U. S. 334, 336). In the cause at bar, it is conceded  
 that “all four units were in use before any of plain-  
 “ tiff’s cows were seriously injured. The four units  
 “ were used indiscriminately, so that it is impossible

“for plaintiff to itemize the injury caused by the  
 “original three units as distinguished from that caused  
 “by the fourth unit purchased by plaintiff after the  
 “installation of the machine” (291); and to this concession the language of Mr. Justice Shiras, in the case last cited, may appropriately be applied:

“such evidence is too uncertain to be made the basis of a verdict for damages, and may well be believed to have worked substantial injury to the rights of the defendant” (158 U. S. 336, *ad finem*).

In view of the foregoing facts, it is our contention, generalizing to a principle from instances suggested by the law of master and servant, by the law of negligence, by the law of landlord and tenant, by the law of damages, and by other departments of the law, that where a given or assumed result is attributable to one of two causes, for one of which the party charged is responsible and for the other of which he is not, the duty rests upon the actor to establish that the result in question was produced by that particular cause for which the party charged is responsible; and that where the actor fails to make this proof, he can recover nothing by reason of the result complained of. We think that this principle, which we submit should rule this case and bring a reversal of the judgment below, is sustained by its intrinsic fairness, by every reasonable legal analogy, and by all of the relevant authority, some of which we will now refer to. In the *American and English Encyclopedia of Law*, volume 8, page 548, dealing with the requisites to the recovery of damages, it is said:



“In order that there may be a recovery in damages there must be (1) a wrongful act, (2) loss resulting, (3) adequate proof of both—which last essential is but the broad general rule requiring a plaintiff to make out his case. ‘It is a fundamental principle’, it has been said, ‘applicable alike to breaches of contract and to torts, that in order to found a right of action there must be a wrongful act done, and a loss resulting from that wrongful act; the wrongful act must be the act of the defendant, and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant’s act. The wrong done and the injury sustained must bear to each other the relation of cause and effect; and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of.’

“As a corollary to the third requirement above stated it has been held that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether without the concurrence of both it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damages would have resulted without such concurrence, so that the consequences cannot be attributed to that cause for which the defendant is responsible.”

And in a very well considered decision of a court of good standing, it is said:

“The rule of law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term ‘natural’ imports that they are such as might reasonably have been foreseen—such as occur in an ordinary state of things; the term ‘proximate’ indicates that there must be no other culpable and efficient agency intervening between the defendant’s dereliction and the loss. \* \* \* Whether an act or omission alleged to be negligence nat-

urally and proximately caused an injury, is, as a rule, a question for the jury. But if there is no evidence connecting the alleged negligence with the injury, or if it is obvious that the act or omission was not the natural and proximate cause thereof, the question is for the court. 21 Am. & Eng. Enc. of Law (2d ed.) 508. Tested by that rule the nonsuit should have been granted.”

*Smith v. Public Service Corporation*, 75 Atl. (N. J. L.) 937.

Speaking upon this topic, the Circuit Court of Appeals for the Eighth Circuit remarks:

“Damages can only be allowed for that which is the result of the breach of the contract, or of the wrong done. And that which is the result of such breach or wrong cannot be determined by speculation, or argument, or the dependency of one contingency on another.”

*W. U. Tel. Co. v. Ivy*, 177 Fed. 63, 66-7, citing  
*Globe Co. v. Landa Co.*, 190 U. S. 540, 544;  
*Boston Ry. v. O'Reilly*, 158 id. 334;  
*Primrose v. West. Union*, 154 id. 1, 29;  
*Richmond Ry. v. Elliott*, 149 id. 266.

It would be strange if this principle did not find operation in the law of master and servant, and that it does, may, we think, without going extensively into the authorities, be shown by the following summary of the law:

“A master is not liable for injuries to a servant caused by a combination of several causes, where none of the alleged causes of the injury is alone sufficient to render him liable, or where the evidence does not show which of several possible causes, some of which do not involve negligence on the part of the master, produced the injury; and the same is true where the cause of the injury is purely conjectural.”

26 Cyc., 1092.



And so, too, in the law of negligence, we find the same principle recognized and applied. Thus, it was said by the Court of Appeals of the State of New York:

“When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damages were produced by the former cause, and he must fail, also, if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture; and a bare possibility that the damages were caused in consequence of the negligence and unskillfulness of the defendant is not sufficient.”

*Searles v. Manhattan Ry.*, 5 N. E. 66, 67.

And it may not be improper to point out that this New York case, just cited, is referred to as authoritative in an opinion by the Circuit Court of Appeals for the Eighth Circuit, wherein that learned court said:

“‘It is not permissible to guess at the cause of an injury, and assume it is something for which the defendant is responsible.’ *Reese v. Clark*, 146 Pa. 465, 23 Atl. 246. The rule, and a sane one, laid down by the Supreme Court, in *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, is that it is not sufficient to show that an accident happened and an injury ensued. The evidence must point out that the negligence of the defendant was the direct cause.

‘Where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.’ This



rule was recognized by this court in *Chicago & N. W. Ry. Company v. O'Brien*, 132 Fed. 593-597, 67 C. C. A. 421, 425.

'When an alleged injury may have been due to one or the other of two causes, either one of which may have been the sole proximate cause, there can be no recovery unless it is shown that as between the two causes in question it was the negligence of the defendant which caused the injuries.' *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *The Nellie Flagg* (D. C.) 23 Fed. 671; *Hartford Company v. Wise*, 75 Md. 38, 23 Atl. 65."

*Minn. Gen. Elec. Co. v. Cronon*, 166 Fed. 651, 658.

We venture to believe that the views of Chief Justice Shaw upon a legal proposition are entitled to great respect; and we therefore quote the following language from a carefully considered decision of his as supporting the view to which we are endeavoring to secure the adherence of this court. The learned Chief Justice said:

"The general rule of law, we understand, is, that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence, so that it cannot be attributed to that cause for which he is answerable."

Shaw, C. J., in *Marble v. Worcester*, 70 Mass. (4 Gray) 395, 597.

And so, likewise, in a more recent Massachusetts decision, it was laid down that:

"If goods are damaged by two different causes, and the defendant is only responsible for one of them, the burden of proof is on the plaintiff to show the extent of

the damage occasioned by the cause for which the defendant is liable. The plaintiff can recover only for the damage from a cause for which defendant is liable.”

*Priest v. Nichols*, 116 Mass. 401.

And the view for which we are contending is not dissented from in the State of California, so far as the decisions of that State approach this question. In *Berry v. San Francisco etc. Ry.*, 50 Cal. 435, it was held that a plaintiff cannot recover for an injury traceable, not to the accused party, but to the instrumentality of a third person: in *Durgin v. Neal*, 82 Cal. 595, 598-9, the view was taken that a defendant company could not be held for damages not proximately caused by its own act, and that the lower court erred in finding that the defendant was liable for damages resulting from the acts of other persons with whom the defendant did not appear to have had any connection; and in *Schwartz v. California Gas Company*, 163 Cal. 398, 401-4, a reversal was justified for failure to give an instruction predicated upon the theory that an intervening, independent agency may have been the proximate cause of the injury complained of, in a case where

“while there was no direct evidence that any third party moved said insulator, circumstances do appear from which a rational inference might be drawn to that effect”.

And so, in *U. S. Fidelity Co. v. Des Moines National Bank*, 145 Fed. 273, 279-280, the *ratio decidendi* involved the principle for which we are contending, for it was there held that

“there being several inferences deducible from the facts, the plaintiff has not maintained the proposition upon

which alone he would be entitled to recover \* \* \*  
 Where the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is essentially wrong”.

And the view for which we are contending receives further support from *Chicago etc. Co. v. Gelvin*, 238 Fed. 14, where the Circuit Court of Appeals held that where the evidence showed some of the injuries to plaintiff's cattle were not caused by defendant's alleged negligence, and there was nothing to show what proportion of the injuries resulted from such negligence, the jury cannot arbitrarily apportion a part, or all, of the proven damages to the cause for which the defendant was liable. In the course of the opinion in this case, the court said:

“On the face of this record, then, the cattle stampeded at various times at a date some time subsequent to the fire, these cattle suffered damage from scouring through eating green grass, their teeth became sore, and they refused to eat. Yet no damage is predicated by the plaintiff upon these incidents. The plaintiff, however, seeks to recover for the loss of flesh, attributing it to the one cause, and to prove it by testimony of values, first, at a time other than immediately succeeding the injury; second, by showing the prices received for the cattle at a place different and at a date long succeeding the date of the injury; third, by showing the gain of these cattle succeeding the fire, and by expert testimony, attempting to show what they ought to have gained, and therefore a loss of the difference; fourth, by showing the prices of heavy cattle at Chicago at a time long subsequent to the date of the injury in question, with no showing as to comparative market conditions, and showing that these cattle were actually light, assuming that they would have been heavy if they had not been injured, and



therefore that a loss of more than \$1.50 per hundred was sustained by the plaintiff upon the entire herd of cattle.

Instead of this record, it was incumbent upon the plaintiff to show, with reasonable certainty, what damage flowed from the alleged injury, by showing the value of the cattle immediately before and immediately after the injury at the farm of the plaintiff. The record showing different conditions, occurring subsequent to the fire, naturally affecting the gain in weight of these cattle, for which it is conceded the defendant could not be held responsible, without any proof of how much of the damage resulted from these conditions as distinguished from the damage resulting from the alleged injury, with nothing in the way of testimony of any witness pretending to even estimate the proportion of the damage resulting from either of the causes, is far short of that reasonable certainty required by law, and upon such a record a jury cannot arbitrarily apportion a part, or all, of the proven damages to the cause for which the defendant is responsible (*Knowlton v. C. & N. W. Ry. Co.*, 115 Minn. 71, 131 N. W. 858), and the verdict of the jury upon the first cause of action, predicated upon a consideration of this evidence, is erroneous."

And finally, the lower court in the cause at bar actually instructed the jury as follows:

"If you believe from all the evidence that the milking machine, while being properly operated, was the cause of the injury to plaintiff's cows, then you are instructed that the defendant Sharples Separator Company can be held liable only for the damages resulting from the use of the three units purchased from it, and that the defendant Sharples Separator Company is not liable in damages for the use of the fourth unit purchased by plaintiff through Edgar Brothers."

In view of what we have heretofore urged upon this aspect of the cause, we respectfully submit that, to employ the language of the Circuit Court of Appeals,

the verdict of the jury herein is erroneous; and we ask that the error be rectified by a reversal of the judgment.

**4. The Evidence Fails to Show the Breach of Any Warranty.**  
*Assignment 7.*

The burden of proof rested upon the plaintiff below to show, not only the existence of a warranty, but also the breach of the alleged warranty: not that the machine failed to operate successfully upon his ranch; not that animals became ill; but that the warranty formulated in the specific contract presented, was breached (*Buckstaff v. Russell*, 151 U. S. 626; *Excelsior Coal Co. v. Gildersleeve*, 160 Fed. 47; *Milling Co. v. Manufacturing Co.*, 227 Fed. 804; *Mercantile Co. v. Land Co.*, 171 Cal. 254; *Waltz v. Silveria*, 25 Cal. App. 717; *Implement Co. v. Blodgett*, 24 id. 19). He must show, in other words, some defect of workmanship or material, existing in the machine at the time of its purchase, and proximately contributing to the result which he alleges to constitute the breach; or he must show that, in some respect proximately contributing to the breach, the machine was not, at the time of its purchase, as represented in the printed matter referred to in, but not identified by, the contract itself; or, he must show that, in some respect proximately contributing to the breach, the machine was not, at the time of its purchase, capable of doing the work as claimed in the printed matter referred to in, but not identified by, the contract itself; and a failure to meet these requirements bars recovery.



In the next place, no resort can be had by the plaintiff below, in aid of his claim, to any alleged parol declarations by anybody; because the rule is well settled that, in these matters, a writing excludes all parol warranties (*Seitz v. Brewers etc. Co.*, 141 U. S. 510; *DeWitt v. Berry*, 134 id. 306; *Randall v. Rhodes*, 20 Fed. cases (No. 11576); *Johnson v. Powers*, 65 Cal. 179; *Kullman etc. Co. v. Sugar etc. Mfg. Co.*, 153 id. 732; *German Surety Co. v. Armsby Co.*, 153 id. 594; *Bancroft v. San Francisco Cool Co.*, 47 Pac. (Cal.) 685); and this rule is emphasized by the additional consideration, that, to be available to a purchaser, the warranty upon which he relies must be part of the contract itself (*Morris v. Bradley Fert. Co.*, 64 Fed. 55; *Grieb v. Cole*, 1 Amer. St. Rep. 533; *Warder v. Bowan*, 17 N. W. (Minn.) 943; *Torkelson v. Jorgenson*, 10 id. 416; *Richardson v. Grandy*, 49 Vt. 22; *Welshausen v. Parker Co.*, 76 Atl. (Conn.) 271; *Underwood v. Carr Co.*, 82 S. E. (N. C.) 855). And here, it may be observed, that not only was no printed matter identified as the particular printed matter referred to in the contract itself: not only does it fail to appear that the purchase of this mechanical milker was made in reliance upon the particular printed matter selected and read by counsel as in his opinion pertinent to this case (117): but also, no printed matter was attached to the contract, or made part of the contract in any recognizable manner, or identified in any way by the contract itself. And in this connection, we submit that it is important to bear in mind the distinction between a misrepresentation, if any, and a



warranty, if any: a representation is, as we understand it, an antecedent statement made as an inducement to the contract, but not a part of or an element in the contract itself, whereas, a warranty becomes by agreement a part of the contract itself; and the untruthfulness of a misrepresentation, unless material or fraudulent, will not affect the contract (compare *Benjamin Sales*, 6th Amer. Ed. Sec. 853; *Behm v. Burness*, 3 B. & S. 751; *Hopkins v. Tanqueray*, 15 C. B. 130; *Martin v. Shub*, 113 N. E. (Ind.) 384; *McCarty v. Williams*, id. 370.).

Moreover, and with particular reference to the very printed matter selected by counsel for the edification of the jury, it will help, we think, to determine the issues here if certain characteristics of that printed matter be referred to. We submit that this printed matter is at most a descriptive recital of the mechanical milker's mode of operation; and it cannot therefore be regarded as a warranty (*Sharp v. Sturgen*, 66 Mo. App. 191; *St. Anthony etc. Co. v. Princeton Co.*, 116 N. W. (Minn.) 935; *Heath etc. Co. v. Hurd*, 86 N. E. (N. Y.) 18; *Carlton Lombard*, 43 id. 422; *Selling Co. v. Cowin*, 133 N. W. (Iowa) 338; *Lumber Corp. v. McCaldin*, 135 N. Y. S. 627; *McClurg v. Tomlenson*, 186 Ill. App. 55; *Wasserstrom v. Cohen*, 150 N. Y. S. 638; *Brown v. Davidson*, 142 Pac. (Okl.) 387). And in the next place, this printed matter amounts, we submit, to nothing more than dealer's talk, and is not, therefore, of itself a warranty. The simple commendation of an article sold, or a general description of its character, value, quality, goodness, soundness, etc., or other

exaggerated statements or recommendations give rise to no warranty (*Titus v. Poole*, 40 N. E. (N. Y.) 228; *Schroeder v. Trubee*, 35 Fed. 652; *Tabor v. Peters*, 49 Amer. Rep. 804; *Brackett v. Martin*, 4 Cal. App. 249; *Mills Co. v. Moore*, 177 Fed. 744; *Iron Works v. Dock Co.*, 168 Cal. 81; *Alexander v. Stone*, 29 Cal. App. 488-489). It may, indeed, be said generally that representations expressive of the vendor's belief, opinion, judgment or estimate, do not constitute a warranty: no expression of opinion, however strong, imports a warranty (*Bryant v. Crosby*, 40 Maine 9; *Henshaw v. Robbins*, 43 Amer. Dec. 367; *Stainaker v. Janes*, 69 S. E. (W. Vir.) 651; *Carber-Shadbow Co. v. Loch*, 151 Pac. (Wash.) 787, 788; *Roberts v. Applegate*, 38 N. E. (Ill.) 676; *Enger Co. v. Dowley*, 19 Atl. (Vt.) 478).

Viewed in the light of these rules, and having regard to its own declarations, the scope of this printed matter selected by counsel—assuming it to have any real relevance whatsoever—is very limited, indeed. No claim is made in this printed matter that the output of milk would actually be increased. At page 115, the printed matter selected by counsel speaks of “a condition which *frequently* increases milk production”—not always, but “frequently” only, leaving an obvious margin for instances wherein the milk production is not increased. There is nothing absolute about this term “frequently”; and it by no means presupposes a condition of absolute and unbroken continuity: it is no more absolute than the word “capable”, for instance, in the contract of sale itself (114). And this may be illustrated by supposing that the company, defendant



in the issue, is offering only to show a capability of the mechanical milker of producing an effect: obviously, it would here be logically of no avail whatever to produce against the company instances in which the effect was not produced: such instances would not meet the point: because it is quite consistent with the capability of producing the effect that there should be instances in which the effect is not produced,—for example, if a party has evidenced by one or two instances the capability of a pistol to carry 200 yards, it is logically of no avail for his opponent to answer by negative instances where it is not carried thus far. Logically, nothing short of a universal negative would suffice. And in this connection, as showing that even this printed matter makes no claim that the output of milk would be increased, attention may be called to the statement on page 116 of the record that the milker “*improves* the flow of milk”—not that it increases it, but that it improves it; also to the statement on page 117, to the effect that the “Sharples milker has a “*tendency* to increase the production of milk”; and attention may be directed also to the advertence on page 117 to the “*probabilities*”. Something of this was evidently in the mind of the pleader who drafted the amended complaint, because, on pages 60 and 61 of the record, we find him, instead of complaining that the output of milk was not increased, merely alleging that the warranty was that the “amount of milk would not be decreased”; and upon this point, reference may further be had to the testimony of Mr. Skinner, near the bottom of page 118 of the record, where he states



that “we proceeded to milk the cows with the machine; “it took the milk away from the cows all right”; and also to his hesitating testimony on pages 162-3 of the record, dealing with the amount of milk given, wherein he confesses that “I have no way of estimating how “much less milk she (the cow) would give”.

And so far as any asserted claim of irritation of the teats of the cow is concerned, the whole case shows, we submit that assuming this condition it was traceable to the bad management and insanitary environment which were such marked characteristics of the Skinner dairy. And such conditions would bar a recovery upon the asserted warranty, even if we did import into it this unidentified printed matter (*Wingate v. Johnson*, 101 N. W. (Iowa) 751; *McKay v. Johnson*, 79 id. 390; *Swanson v. Allen*, id. 132; *Razey v. J. B. Colt Co.*, 94 N. Y. S. 595; *Leopold v. Van Kirk*, 27 Wis. 152; *Avery Planter Co. v. Rigg*, 56 Ill. App. 599; *Mack v. Sloteman*, 21 Fed. 109; *Road Roller Co. v. Coffman*, 72 S. E. (W. Vir.) 749; *Ellis v. Barclay*, 142 N. W. (Iowa) 203; *Belting Co. v. Mfg. Co.*, 100 N. E. (Ill.) 920; *Chapman v. Roggenkamp*, 182 Ill. App. 117; *McKinley v. Small*, 146 N. W. (Mich.) 230). Indeed, it may be said that improper use or mismanagement is a sufficient answer to a claim based upon an alleged warranty.

It is proper, moreover, we think, to call attention to the general rule that a warranty relates only to the time of sale and does not cover defects, if any, arising in the future (*English v. Spokane Com. Co.*, 57 Fed. 451), and that in the contract before the court in this controversy there is no warranty as to the action or

operation of the mechanical milker *in futuro*, the sole statement made being that the milker was "capable" of doing the work, not that it would so continue. And not only is a warranty limited to the time of the purchase itself, but, assuming the existence of a warranty in the cause at bar, it would be limited to the original three units (compare *Griggs v. Stone*, 7 L. R. A. 48; *Troy Laundry Co. v. Henry*, 31 Pac. Ore. 484; *Cyclone Co. v. Vulcan Iron Works*, 51 Fed. 920; *Hotel Co. v. Stoker Co.*, 178 Fed. 806), and cannot, we submit, be held to reach over and apply to a subsequent unit imported into the milker from a source foreign to or disconnected from the party sought to be charged under the asserted warranty. The burden of the testimony in this cause shows that the real trouble here arose upon or after the advent of the fourth unit, and that, after its delivery, this fourth unit was used indiscriminately upon the various animals: is a warranty, assuming one of the character asserted, unbroken until the advent of this alien unit, now to be appealed to to hold this company responsible for a condition much more readily traceable to the fourth unit than to the original three? We submit that such a result would be unjust.

It must, in addition, be steadily borne in mind that the sale of this milking machine was made subject to the conditions of sale, which conditions were quite as much a part of this contract as was this asserted warranty; and no acute accent may be put upon the alleged warranty so as to maximize it and minimize the "conditions of sale" without formulating a new contract for parties in whose minds the "Conditions of Sale"



and the "guarantee" were of at least equal importance and value. While, in point of fact, as the contract itself shows, "This sale is made with the understanding that " the purchaser will have the machine operated and " cared for in accordance with our instructions. This " is necessary for the profit and satisfaction of the " purchaser and for the protection of the manufacturer. " Special attention is called to the following points: " That the machine be kept in good order mechani- " cally.

"That the pressure and vacuum adjustment shall be " maintained in accordance with instructions.

"That the cows be carefully and thoroughly stripped " after each milking.

"That the machine be thoroughly cleaned after each " milking and that all reasonable precautions tending to " the production of clean milk be observed" (113-114), still, none of these conditions were complied with. Thus, the machine was not kept in good order mechanically: no other conclusion can be drawn from Skinner's testimony; and his testimony at page 129 as to the dirt which had gotten into the machine, and as to the new rubbers which became necessary, would of itself be sufficient to show his disregard for the mechanical good order of the machine. And so, likewise, with his failure to maintain the adjustment of the pressure and vacuum: his testimony as given at pages 146-7-8, and as illustrated by the testimony of his son on page 169, makes it quite clear that this condition of sale was honored much more in its breach than in its observance. No sort of showing is made that the machine was thorough-



ly cleaned after each milking; Mr. Skinner's testimony as to the dirt, on page 129, his admission on pages 149-50 that he never washed or cleaned the teat cups between one cow and another at any time, and that after he milked a cow he did not wash the teat cups before he put them on another cow, and his confession that the water used in connection with this milking machine was the bacteria-tainted water from the Colorado river, especially as these points are illustrated by the testimony of Reed, all concur in showing that this condition of sale was in no way intelligently complied with as required by the contract. And so, likewise, with the requirement that "all reasonable precautions tending to the production of clean milk be observed" (114). The violation, and the persistent violation, of this condition of sale is established here, not alone by Skinner's backward and unprogressive views as to sanitation and improved dairy conditions, not alone by his willingness to abide by the primitive methods of his fellow dairymen in Imperial Valley, but also by specific testimony as to the absence of any visit from a veterinarian prior to 1914 (150), and also as to the absence of any visit from any veterinarian upon Skinner's invitation during 1914 (152), and also as to the failure to have any competent person properly examine the milk drawn from his cows (160, 161), and also as to the absence of such improvements as a barn, a cement floor and proper stanchions (141-3), and also as to the cows walking about in the mud (155), and also as to the use by the cows of the irrigation ditches (154), and also as to the water used both for cows and utensils (152,

158, 179-181), and also as to the water or mud holes (235, 236), and also as to the general dirtiness of the place (238), and also as to the failure to isolate sick cows (167-171), and also as to other particulars which might well be enumerated: but sufficient, we think, is here stated to establish the utter and complete disregard of this most important condition of sale.

In view of these considerations, we are unable to understand how it can be said, bearing in mind the relevant rules of law and the disclosures of this record, that this evidence establishes any breach of any warranty for which the plaintiff below was entitled to recover. The very contract upon which he relied called for the performance of certain duties upon his part, and "special attention" was called by the contract itself to those very duties: the evidence discloses an utter disregard upon his part of the obligations resting upon himself: upon no principle of equity or right, can he be permitted to claim the benefit of the contract while disclaiming and disregarding the burden thereof; and since the evidence clearly establishes a persistent breach by him of the conditions of the contract, conditions vital to any recovery as for a breach of warranty, we respectfully insist that the evidence fails to disclose any such breach of warranty for which this defendant company can be held justly responsible.

# **ERRORS COMMITTED DURING THE COURSE OF THE TRIAL.**

- 1. It Was Error to Admit Unidentified and Disconnected Printed Matter Which Was Merely Part of the Preliminary Negotiations Leading Up to the Actual Transaction of Sale, Which Was Not in Itself Made a Part of the Actual Contract of Sale, and Which Was Not in Itself a Warranty.**

*Assignments 8, 16-17, 18.*

In the general statement of the case which has heretofore been made, the facts relative to the original appearance of this printed matter during the course of the preliminary negotiations have been referred to, and those observations need not be repeated here. That this printed matter was not itself made a part of the actual contract of sale, may be determined by inspection of the contract itself; and nowhere throughout the record have we been able to find a particle of evidence to establish that the printed matter offered and received in evidence by the court below was the same printed matter so vaguely referred to in the contract of sale itself.

This printed matter, which was, without proper identification, received and read in evidence in the court below, was, we submit, a prediction merely,—the expression of hopes, expectations and beliefs, but nothing more. We submit that Mr. Skinner had no right to believe, from anything contained in any of the documents, and particularly from anything contained in this printed matter, that the successful operation of the machine was dependent solely upon the materials and workmanship contained in it, because there were



a great many other factors entirely without and beyond the control of the machine itself which would necessarily influence its operation: such, for example, as the personal equation of the operator, the preservation of the machine in good mechanical order, the adjustment of pressure and vacuum in accordance with the instructions of the company, the careful and thorough stripping of each cow after each milking, the thorough cleaning of the machine after each milking, and/or the observing of all reasonable precautions tending to the production of clean milk. Many things, indeed, might be mentioned in this connection as matters quite beyond the control of the present plaintiff in error, but which nevertheless would be the most important considerations in the successful operation of the machine: in a word, there were too many collateral considerations entirely beyond the control of the machine itself to justify the court or jury below in treating the promissory statements of this printed matter as warranties. Obviously, a statement as to what a machine would do in the future, is simply a matter of opinion—purely conjectural, and not a warranty; and there is in this case no warranty as to the operation of this machine regardless of the surrounding circumstances, or regardless of due compliance with those “conditions of sale”, subject to which the machine was sold. The case which has been sought to be made here is not one of an established mechanical defect in the machine *qua* machine: no such proof was made; but the case here is one of the purchase of an article in respect to the operation of which, in producing a desired result under particular

circumstances, the buyer found himself disappointed—a disappointment which the evidence traces to conditions not in any way attributable to the machine itself. The statements contained in this printed matter were no more, we submit, than expressions of opinion, confessedly honestly entertained, and obviously dependent upon other elements than the machine itself—dependent upon actual and sincere compliance with the “conditions of sale”, concerning which Mr. Skinner himself could form an opinion as well as this plaintiff in error, or better.

**2. It Was Error to Admit the Incompetent Conclusions of Witnesses Upon Matters Material to the Correct Decision of the Cause.**

The rule that witnesses must state facts and not conclusions, is an elementary one: if there be a rule well established in the law of evidence, it is that a witness must be confined to a statement of facts, leaving the conclusion to be drawn from those facts to the jury. The function of the witness is to state what he actually observed, but it is no part of that function for the witness to formulate for the jury a conclusion upon the facts which he observed or to which he testified. It is clearly never the province of a witness to act as judge and jury—to invade the province of the jury, or to substitute his conclusion for that of the jury; and it is against recognized principles to address questions to a witness which were so framed as to call upon him to determine controverted issues of facts or to pass upon the effect of a series of facts. Thus, it would obviously be improper to ask a witness to



state his conclusion upon the testimony in a case relating to any given question: because, in such an instance, the witness is in effect asked to decide the merits of the case, which is a duty wholly beyond his province; and no rule of law authorizes the invasion by the witness of the province of the jury by drawing those conclusions of fact upon which the decision of the cause depends. It is for the jury alone to draw conclusions and inferences from the facts proved: it is not for a witness to arrogate to himself the function of a witness, jury or judge, or to invade the legitimate province of the real triers of the facts. In other words, there is no principle of the law of evidence with which we are familiar, which justifies the admissibility of the conclusions or impressions of the witness. Thus, as observed in the well considered case of *People v. Sharp*, 107 N. Y. 427,

“The opinion, the thought, the understanding of the witness, is not evidence”;

and this same idea has found expression in many decisions of respectable courts. Thus, that a meeting was “disturbed” is incompetent (*Morris v. State*, 94 Ala. 467); that a contract has been “abandoned” is incompetent (*R. R. v. Woodworth*, 8 So. (Fla.) 177); that goods were “accepted” is incompetent (*Brewer v. R. R.*, 107 Mass. 277); that possession was “adverse” is incompetent (*Arents v. R. R.*, 156 N. Y. 1); that an act was within an agent’s “authority” is incompetent (*Beninghoff v. Insurance Company*, 93 N. Y. 500; *Green v. R. R.*, 35 Amer. Rep. 370; *Rodgers v. Virginia Chemical Co.*, 149 Fed. 1); whether a party “assented” to a



settlement, is incompetent (*Stanton v. Cristoll*, 9 Hun. 502); to declare "merchandise entitled to debenture" is incompetent (*W H. Thomas & Son v. Barnett*, 135 Fed. 172); that a house was in "good repair" is incompetent (*McMann v. Dubuque*, 107 Iowa 62); whether one is a man of "financial ability", or "responsibility", or "solveney", or "insolveney", is incompetent (*Thompson v. Hall*, 45 Barbar 216; *Denman v. Campbell*, 7 Hun. 88; *York v. People*, 31 Hun. 446; *Hahn v. Penney*, 60 Minn. 487; *Agnew v. U. S.*, 165 U. S. 36); whether another had "knowledge" is incompetent (*Bailey v. State*, 107 Ala. 151; *McCouster v. Banks*, 84 Md. 292); that certain articles were "necessary" is incompetent (*Poock v. Miller*, 1 Hilt, 108; *Tolles v. Wood*, 99 N. Y. 616); whether one engine discharged more sparks than another is incompetent (*Collins v. R. R.*, 109 N. Y. 243); whether a person "has done as agreed" is incompetent (*Nichols v. White*, 41 Hun. 152; *Clark v. Ryan*, 95 Ala. 406); and see further in support of this principle:

*Porter v. F. M. Davies & Co.*, 223 Fed. 465, 1022;

*Largan v. R. R.*, 40 Cal. 272;

*Tait v. Hall*, 71 id. 149;

*People v. Reed*, 52 Pac. (Cal.) 835;

*People v. Elliott*, 119 Cal. 593;

*Watrous v. Morrison*, 33 Fla. 261;

*State v. Porter*, 52 Pac. 175;

*Linihan v. State*, 22 So. (Ala.) 662;

*Raney v. State*, 45 S. W. (Texas) 489;

*Murray v. R. R.*, 52 Pac. (Utah) 596;

*People v. Fogalson*, 74 N. W. (Mich.) 730;

*Tillery v. State*, 24 Tex. App. 251;

*Brinkley v. State*, 89 Ala. 34.

Some illustrations of the disregard exhibited during the trial below for the principle to which we are appealing may here be briefly referred to. Thus, on page 120 of the record, Mr. Skinner was permitted, without any showing either of obligation on the part of the company, or that the facts testified to were within his knowledge, to state his conclusions as to asserted duties resting upon the defendant company: he was permitted to declare, referring to the company that "They was to send this demonstrator there once a month to go through my herd and see if everything was working all right"; and the effort on the part of the defendant company to have this objectionable matter removed from the record was denied by the learned judge of the court below. An inspection of the contract of sale, by which, if by anything, the rights of these parties are to be determined, fails to disclose any duty resting upon this company to send a demonstrator to make monthly visits to Mr. Skinner's herd: all that the contract called for was the installation of the machine: it called for nothing more: that installation was duly accomplished; and it is expressly provided in the contract that "all terms and agreements of this order appear hereon in writing" (113). Upon what principle, then, Mr. Skinner should be permitted to state his conclusions as to any duties upon the part of the defendant company, we are unable to understand: we submit that this new obligation of monthly

visitation by a demonstrator cannot, through the medium of a bald conclusion by Mr. Skinner, be imported into the relations between these parties without violating all rules; and we submit that this declaration of Mr. Skinner was objectionable and inadmissible because it was an attempt to vary and enlarge, by a parol conclusion of a witness, the actual terms of a specific written contract (Assignment 19).

Again (Assignments 23-24), the witness Skinner was permitted to testify to his conclusions as to "loss as "the result of the operation of this milker"; and his testimony in that regard will be found on pages 126-7 of the record. As part of his answer to the inquiry made on page 126, the witness, in actual terms, states, not facts from which a jury could draw its own inference or make up its own opinion, but his "opinion", saying, in that connection, that "if they had not used "this milker the cows would, in my opinion, have held "up",—a sheer conclusion going directly to the merits of the controversy, and a plain invasion of the province of the jury. This particular subject matter will be hereafter more fully discussed.

Another illustration of the disregard for this settled rule of evidence above adverted to, will be found in the testimony of Mr. Boarts, at page 259 of the record (Assignment 73).

The answer in the cause insisted in very specific terms upon the insanitary condition of Mr. Skinner's premises. While Mr. Skinner was a witness, he testified to a number of facts quite inconsistent with that degree of cleanliness and good sanitation which common ex-



perience expects in a milk dairy. And from other witnesses in the cause, information was obtained sometimes directly, sometimes indirectly, which emphasized the lack of sanitary precautions upon Mr. Skinner's part. This lack of sanitary precautions was, of course, a plain violation of the "conditions of sale" under which the milker in question was sold; and reference is made, in our general statement of the case, to some of the details illustrative of sanitary conditions upon Mr. Skinner's premises. This subject matter was, therefore, material in the cause, so much so, indeed, that Mr. Boarts was produced as a witness concerning conditions upon the Skinner premises. When examined, Mr. Boarts, instead of presenting the jury with the facts, and leaving the jury to draw its own conclusion, undertook to decide matters for the jury by declaring, *inter alia*, that Mr. Skinner "had a very "good dairy house". The defendant company promptly moved to strike out this answer as being a conclusion of the witness—as it undoubtedly was; but the learned judge below permitted the conclusion to remain in evidence and denied the application. In view of the importance which the sanitary conditions upon the Skinner premises had attained during the trial below, it is submitted that this ruling was particularly bad; and if, as was held in *McMann v. Dubuque*, 107 Iowa 62, testimony that a house was in "good repair" is incompetent, then we think that by analogy of reasoning, a declaration that "he had a very good dairy house" is equally incompetent. Mr. Boarts was a fellow dairyman of Mr. Skinner from Imperial

Valley; and we submit that no reasonable person can say that the jury below was not influenced by this conclusion of Mr. Boarts upon a matter which figured so largely in the sanitation of Mr. Skinner's premises.

Another illustration of which we complain, will be found in the testimony of Dr. Cram, on page 275 of the record (Assignment 75). Dr. Cram was a veterinarian who found a diseased condition of the udders of several of the cows about the last of June, 1914: he found pus in the teats of the cows, which he conceded indicated the presence of a germ. He conceded further that there were two or three kinds of germs, but declared that "I did not make any bacteriological test of "the germs from Skinner's cows". He then undertook to claim that while the presence of pus did indicate the presence of a germ, yet this germ was neither infectious or contagious; and in line with this position declared "I presumed it was "staphylococcus, I presume it was, my opinion is a presumption, and I made "no bacteriological or chemical analysis". The motion of the defendant company to eliminate this mere presumption on the part of this witness, was denied by the learned judge below. We submit that the motion should have been granted: that the declaration of this veterinarian was not only an empty conclusion predicated upon no substantial data, but it was even worse,—it was plain blind guess work.

Not to multiply illustrations, attention may be directed finally, to the testimony of Mr. McCulloch, included between pages 282 and 285, of the record, Assignments 77-81. Mr. McCulloch exhibited no such



peculiar knowledge as justified him in posing as an expert. He was another Imperial Valley dairyman; but it nowhere appears that he ever made a study of the causes or effects of mammitis. In addition to this, it does not appear that he was qualified to express expert opinions upon the subject of the operation of mechanical milkers. It appears that he himself operated a mechanical milker for two months: but beyond that, the only mechanical milker which he saw operated was one at Mr. Miller's place, one at the Hinman place and "D. L. K." There is no proof anywhere that these three (?) mechanical milkers which Mr. McCulloch saw operated, were properly operated. Over the objection of the defendant company Mr. McCulloch testified that he followed the instructions of the company in operating his milker: this, of course, was a sheer conclusion upon his part: but there is not even this to show how the other three mechanical milkers were themselves operated. Nor does it appear how much familiarity with the other mechanical milkers is implied in his statement, "I have seen operated"; nor does he attempt to state what results were obtained in the operation of the other milkers. In this stage of the evidence, we fail to see how Mr. McCulloch has qualified as an expert in milking machines to such an extent that he was entitled to make such wholesale statements of opinion as those which were admitted by the learned judge of the court below. We submit that this vice runs all through the testimony of Mr. McCulloch, and that various objections and motions of the defendant company, made in the effort to weed



out Mr. McCulloch's unwarranted conclusions should have been sustained by the lower court.

The cause at bar was a cause closely contested upon the facts and that, too, before a jury: under such circumstances, it is highly essential that the trial be had according to the established rules of evidence; and under these circumstances, we submit that this free indulgence in conclusions was much more prejudicial than if the cause had been heard before the court sitting without a jury. It is, we submit, impossible to say that the jury were not influenced by these unauthorized conclusions of the witnesses.

3. **The Lower Court Erred in Permitting the Acts, Conduct, Declarations and Agreements of Briggs to Be Laid Before the Jury, Notwithstanding That He Was Not Shown to Have Been Authorized to Bind Thereby the Defendant Company.**

*Assignments 20, 21, 26-29-32.*

Nothing, in our opinion, could well have been more prejudicial than the action of the learned judge in this behalf: it certainly could not have failed to have influenced the jury in a marked degree; and certainly no one, we think, can fairly say that it did not. The record here shows that up to the first mention of Mr. Briggs name, no proof whatever had been made either of any agency, or of the scope of any agency. Up to that time, the solitary witness had been Mr. Skinner himself: but Mr. Skinner knew nothing about Mr. Briggs: as Skinner puts it, "I had never seen him before" (122). Mr. Skinner then goes on to state what Mr. Briggs said:

but, as observed by the Circuit Court of Appeals for the Eighth Circuit, "The admissions and declarations " of an alleged agent are alike incompetent to establish " his authority or the extent of his powers" (*Walmsley v. Quigley*, 129 Fed. 583, 585; and see, also, to the same effect, *W. K. N. Coal Co. v. Piedmont, etc., Coal Company*, 136 id. 179; *In re Thomas*, 199 Fed. 214; *Chicago etc. Ry. v. Chickasha Nat. Bk.*, 174 id. 923; *West v. Grocery Company*, 138 N. C. 166; *People v. Dye*, 75 Cal. 108; *Peterson v. Stockton etc. Co.*, 134 id. 244; *Curry v. Syndicate*, 104 Ill. Apps. 165; *Osgood v. Pacey*, 23 id. 116; *French v. Wade*, 11 Pac. (Kas.) 138; *Fullerton v. McLaughlin*, 24 N. Y. S. 280; *Sier v. Bache*, 27 id. 255; *Larson v. Investment Co.*, 53 N. W. (Minn.) 179; *Salmon Falls Bank v. Leyser*, 22 S. W. (Mo.) 503); and nothing, therefore, we submit, that Mr. Briggs may have said to Mr. Skinner, could establish either an agency or its scope. Neither Mr. Skinner's son, nor his wife, throws any light upon the situation; and the plaintiff's case ended without any proof whatever of any agency on the part of Mr. Briggs, or as to the scope of any agency on his part.

Bearing this in mind, what was done by the learned court below? On pages 122-3 of the record, and over the objections of the defendant company, one of which specifically was that "Briggs had no authority to contract", the learned judge of the court below permitted proof to be made of the execution of a written agreement between Mr. Briggs purporting to act for the defendant company and Mr. Skinner; and this written agreement will be found set forth in full in the record



on page 293 thereof. Upon what theory these facts were admitted in evidence, we frankly cannot understand. If there had been any evidence to show that Mr. Briggs had been invested by the defendant company with authority to enter into binding written arrangements, one could understand this action by the lower court: but in the absence of that foundation, the ruling of the lower court is to our minds inexplicable. It having appeared that the writing was made and that, as Skinner remarked, "but for my receiving  
 " this written paper, I would not have allowed Reed  
 " to restart the machine" (123), thus arousing and exciting the curiosity of the jury as to the contents of that written paper, the written paper itself was offered in evidence. Thereupon, objections having been made to its admissibility, a ruling was reserved pending argument by counsel; and subsequently, as appears from page 127 of the record, the learned lower court ruled that "such purported agreement was not competent  
 " evidence in this case and sustained the objection made  
 " thereto by the defendant Sharples Separator Com-  
 " pany, a corporation". One would suppose that this would have ended the matter of this writing, that the ruling of the learned judge below would have been respected by all concerned, and that all future references to this unauthorized writing would have been stopped: one would have supposed that the learned judge below would have stopped the plaintiff from doing indirectly what he could not do directly; and one would have supposed that the learned judge below would have himself abstained from participating in any



references to a writing which had been ruled out by himself as incompetent evidence. But, what happened? Notwithstanding the absence of proof of any agency in Briggs, notwithstanding the absence of proof of any authority in him to bind the defendant company by contract, notwithstanding the ruling excluding from the jury knowledge of the contents of a writing which had so materially influenced Mr. Skinner (“but for my receiving this written paper, I would not have allowed Reed to restart the machine” 123 ad finem), yet the learned lower court permitted, against the objections and exceptions of this plaintiff in error, constant reference to this excluded agreement and to its existence, and to its importance and its effect upon Mr. Skinner; and these repeated references to this purported agreement were all the more prejudicial, because their veiled character left the jury to imagine what they pleased concerning it,—the jury knowing that a writing was made, knowing that this writing had seriously influenced Mr. Skinner’s action, knowing that Mr. Skinner wanted that writing exhibited to them, and knowing that the defendant company had stopped its exhibition by an objection, but not knowing the contents of the writing. Thus, while the actual text of this unauthorized Briggs writing was, properly, not allowed to go to the jury, yet the plaintiff was permitted to keep the fact that there was an agreement before the eyes of the jury and this to permit—if not to invite—the jury to draw any inference however broad, however favorable to Mr. Skinner, however prejudicial to the defendant company,

as to the origin of the agreement and/or as to its contents.

A sufficiently typical illustration of this procedure, emphasized by the affirmative action of the learned judge himself, may here be exhibited. Near the bottom of page 123, the plaintiff below was allowed to say, "but for my receiving this written paper, I would not have allowed Reed to restart the machine" (what had this plaintiff in error to do with the uncommunicated motives that actuated Skinner's personal conduct? *Wheless v. Rhodes*, 70 Ala. 419; *Stewart v. Whitlock*, 58 Cal. 2; *Burns v. Campbell*, 71 id. 271; *Woods v. Whitney*, 42 Cal. 358; *McCormack v. Joseph*, 77 Ala. 236; *Brown v. Hickey*, 68 Iowa 330; *McDonald v. Jacobs*, 77 Ala. 524; *Herring v. Skaggs*, 34 Amer. Rep. 4; *Williams v. State*, 26 So. (Ala.) 521); and at the top of page 129, he stated, speaking of the machine, that "Mr. Reed used it after Briggs came there". Thereupon, the learned judge below, notwithstanding the absence of any proof of Briggs agency, or of its scope, or of his authority to bind the company by contracts of any character, and notwithstanding his own ruling excluding the Briggs agreement, actually inquired of the witness, the plaintiff himself, "did you consent to its being used on your cows by reason of what Briggs induced you to do?"; and the witness, against objection, was permitted to answer in the affirmative. Than this question coming from the court itself, could have anything been more potent to convey to that jury by indirection what the court itself refused to allow to be conveyed directly? Could that jury



have failed to have been impressed by this action of the court with the gravity and potency of that agreement to which, notwithstanding its exclusion upon the defendant's objection, the court himself thus voluntarily returned? Nothing is more common, as every man experienced in the ways of juries will concede, than that mental habit whereby jurors attach ideas of potency to that which is unknown to them, and particularly to that which an objection prevents them from knowing,—a general trait, indeed, which is concentered in the familiar maxim, *Omne ignotum pro magnifico*. And why should the burden be put upon the defendant company of meeting the implications conveyed by this question from the bench and the responsive answer thereto from the witness? How, indeed, can it be said that this proceeding did not operate to the detriment of the defendant company, particularly, since it had its origin “from the high and authoritative position of a judge presiding at a trial before a jury” (*McMinn v. Wheelan*, 27 Cal. 319; *People v. Williams*, 17 id. 147-8; *Hair v. Little*, 28 Ala. 236; *People v. Conboy*, 15 Cal. App. 97)?

The same prejudicial utilization of forbidden and excluded material occurs on page 131 of the record. There, the following occurred:

“Mr. SWING. Q. With reference to the guarantee  
 “ which he gave you, or purported to give you at the  
 “ time you consented to restarting the milker, I will  
 “ ask you if at any time since you have ever received  
 “ any notice or intimation from the company that that  
 “ was not a valid contract or guarantee?



“Mr. PARKE. We object to the form of the question  
 “ —that a guarantee was given by Briggs; and if that  
 “ alleged contract was not binding upon the company,  
 “ it would not make any difference whether they ever  
 “ repudiated it or not, if there was no consideration  
 “ therefor.

“Said objection was then and there overruled by said  
 “ court, to which ruling said defendant, Sharples Sep-  
 “ arator Company, a corporation, then and there duly  
 “ excepted, and now assigns said ruling as error.

“Exception Number 12.

“The WITNESS. They did notify me.

“The COURT. Did they ever notify you that Briggs  
 “ was not their agent and had no authority to do what  
 “ he did do?

“Exception Number 13.

“The WITNESS. No, sir.

“Mr. PARKE. We move to strike out the answer of  
 “ the witness.

“Said motion to strike out was then and there denied  
 “ by said court, to which ruling said defendant, Sharples  
 “ Separator Company, a corporation, then and there  
 “ duly excepted, and now assigns said ruling as error.”

One seeks in vain for some relevant purpose in coun-  
 sel's question. It may possibly have been a misguided  
 attempt to establish a ratification of the Briggs agree-  
 ment by the company. It certainly amounts to an ad-  
 mission that Briggs was originally without authority  
 to contract and that his act required ratification: but  
 the circumstance sought to be elicited by the question

would obviously be insufficient to establish any ratification. In substance, the witness was asked whether the company notified him that the Briggs' guarantee was not a valid contract and the witness replied, "they did notify me". If by this the witness means that the company notified him that the Briggs guarantee was not a valid contract, then, instead of a ratification, we have a repudiation; and, of course, if there were no evidence that the company knew the existence of the Briggs contract, its failure to notify Mr. Skinner that the contract was not valid would not be evidence to establish its approval of the contract—one does not ratify that of which one is ignorant. And this criticism is applicable also to the question of the court. In that question, the unfortunate assumption is made that Briggs had assumed to act as agent for the company, and apparently a ratification of his conduct is sought to be deduced from something which the company did *not* do. The mere fact that the company did not notify Mr. Skinner that Mr. Briggs was not their agent and had no authority to do what he did do, is not only wholly insufficient to resurrect the contract, but it is further without efficacy because unaccompanied by proof that the company did know what Briggs did do; and plainly, neither court nor counsel below considered this to be any recognition or ratification of the contract, for the obvious reason that no attempt was made to re-offer the contract in evidence. It may be, however, that, in view of the posture of the case upon this point, counsel felt satisfied that the indirect references to this

contract were sufficiently favorable to the plaintiff below to influence the jury in his behalf.

Another illustration of this indirect user of prohibited material may be found on page 172. There, the following occurred:

“Mr. Skinner did not want to start the machine, and I was very bitterly opposed to it, but he finally started it under that written paper.

“Mr. SWING. Q. Was it started before or after that written paper was signed by Mr. Briggs?

“Mr. PARKE. We object to that. There is no evidence of a written contract of any kind.

“The COURT. Objection overruled.

“Mr. PARKE. Note an exception.

“Exception Number 16.

“And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

“The WITNESS. After.” (172)

Plainly, defendant's counsel was right: there was no more evidence of any “written paper signed by Mr. Briggs” than there was of any authority upon the part of Mr. Briggs to bind the company by signing any written paper; and in view of the action of the lower court, in excluding the written paper, it was entirely wrong to predicate any question upon the existence of or signature to such written paper. Nevertheless, the question asked and the answer given presupposed the very written paper that the court had excluded, and left the jury free to indulge in the wildest imaginings as to its contents.



During all this there was, as already observed, no evidence whatever establishing either any agency in Briggs, or any authority in Briggs as an agent to bind the defendant company by contracts which he might choose to make. When Briggs himself came upon the stand later in the cause, no inquiry was made from him by the plaintiff as to the nature of his duties or the scope of his employment; and the testimony of Mr. Frank quite fails to further the contention of the plaintiff. Mr. Frank says:

“I know F. L. Briggs. He was in the employ of the “ Sharples Separator Company. I could not give the “ period of time. He was there during 1914. He was “ there when I went with the company and he was still “ there with the company when I left. His position “ was *milking machine expert*. His duties were to look “ after the *milking machines*, their *installation and* “ *troubles* which customers occasionally have and see “ that *that particular line of work* was carried on “ properly, and to instruct the dealers and agents in “ *the proper use of the machine*. He received instruc- “ tions from me and worked under my supervision”

\* \* \* “I instructed F. L. Briggs to go to the ranch “ of W. W. Skinner, at El Centro, in 1914. Skinner was “ complaining that he thought his milker was not “ operating properly, and in accordance with our usual “ custom I sent Briggs there to see if he could not be “ satisfied, or rather, I sent Briggs there to see if he “ could not overcome his difficulty. I do not remember “ exactly what instructions were given to Briggs, but “ simply wrote or told Briggs personally to follow out

“ his usual custom or usual practice in attempting to  
 “ satisfy customers or to correct any faulty installa-  
 “ tion and find out what was wrong and straighten out  
 “ the trouble” (252-253). Not only did all of this come  
 out after the damage had already been done to the  
 defendant below, but this testimony in itself wholly  
 fails to show that Mr. Briggs was either a commercial  
 agent of the company, or that he was authorized in  
 any way to bind the company by contract, or that he  
 had any duty to perform other than the purely me-  
 chanical duties incident to the installation and opera-  
 tion of the machines. It nowhere appears that Mr.  
 Briggs was invested by the defendant company even  
 with authority to sell machines; and therefore under  
 Section 2323 of the California Civil Code, he would  
 be without authority to warrant the title of his principal  
 or the quality or quantity of the property sold.

When all of the evidence relating to Mr. Briggs and  
 his activities is collated, it demonstrates that Mr.  
 Briggs was merely a mechanical employee of the com-  
 pany; that his duties were limited to the demonstration  
 and operation of the milking machines; and that his  
 activity was limited to the operation of the milker with  
 mechanical propriety. He dealt, not with commercial  
 or business transactions, but with matters of manual or  
 mechanical execution (*Kingnan & Co. v. Silvers*, 37  
 N. E. (Ind.) 413, 416): he was sent to Mr.  
 Skinner’s premises to inspect the machine and to put it  
 into proper mechanical operation: he was not sent  
 there to enter into contracts that would bind the  
 company: it was not his business to enter into engage-



ments which the company had not authorized or of which it had no knowledge: Skinner “had never seen “ him before” (122): “When Mr. Briggs came on the “ scene, I never knew about his coming; I did not know “ how he came or when he was coming, until he got “ there” (162); and the mere fact that Mr. Briggs assumed to enter into a contract with Mr. Skinner did not justify Mr. Skinner in assuming that Mr. Briggs was “authorized to do what he did do” (131), without any inquiry whatever. It is remarked in *Walmsley v. Quigley*, 129 Fed. 583, where a trustee holding the legal title to land purported to be authorized to bind the *cestui* to pay the plaintiff a commission, if plaintiff could obtain a purchaser for the land, that:

“Proof of the authority of Morrison to make this agreement on behalf of Walmsley was clearly an indispensable prerequisite to the competency of evidence of the agreement \* \* \* The admissions or declarations of an alleged agent are alike incompetent to establish his authority or the extent of his powers.

The Circuit Court should have sustained the objection to evidence of the agreement to pay the commission until the plaintiff had established the fact by competent proof that Walmsley had authorized Morrison to make such a contract on his behalf \* \* \* A careful perusal of the entire record had produced a settled conviction in our minds that there was no evidence at any time during the trial that the defendant ever gave Morrison such authority or that he ever ratified any such contract. The result is that proof of the agreement of Walmsley to pay the commission was not only incompetent at the time it was offered, but it never became competent at any time during the trial of the action and the error in receiving it was crucial and fatal to the plaintiff's recovery, so that it becomes unnecessary to consider any other question presented in this case.”



So, in *Chicago etc. Ry. v. National Bank*, 86 Fed. 742, where a general agent to buy cotton made contracts with a bank borrowing money for his principal, etc., it was held that such contracts were not within the scope of his authority, and the court there used the following suggestive language:

“The bank did not, as it might have done for its protection, first learn the full extent of the power possessed by Carter from his principal \* \* \* but on the contrary, assumed to engage in the business without any investigation, and in reliance on appearances and the word of the agent \* \* \*”

And again, in *U. S. Bedding Co. v. Andre*, 150 S. W. (Ark.) 413, where it was held that a traveling salesman cannot bind his principal by contract for advertising his goods, the court said:

“A person dealing with an agent is at once put upon notice of the limitations of his authority, and must ascertain what that authority is. Such person cannot presume that such authority exists, he cannot rely upon the representations of the agent as to what that authority is; he must make inquiry and use due diligence to learn the nature and extent of such authority. If he does not, he deals with the agent at his own risk, and if the authority of the agent is disputed it devolves upon him to prove it.”

And so, likewise, in *Brager v. Levy*, 90 Atl. (Md.) 102, the court in holding that the burden rested upon the plaintiff to establish the existence and the scope of the asserted agency, makes the remark that

“they dealt with him as the agent of the defendant for the first time, without making any inquiry as to the extent of his authority”,

a remark which reminds us that on page 122 of our record, Mr. Skinner tells us that “Mr. Briggs appeared “ on the scene one day and told me he had come down “ to straighten up the milking machine business with “ me. I had never seen him before”; and on page 162, Mr. Skinner tells us that “Mr. Briggs came upon the “ scene, I never knew about his coming; I did not know “ how he came, or when he was coming until he got “ there”. And here it may be added that the views which we are endeavoring to impress upon this court are fully sustained by the California, among other, authorities:

“The ground upon which the respondent relies in support of the findings is that, in the negotiations between the plaintiff’s father and Munroe for the exchange of the properties, Munroe was the agent of the defendant for that purpose, and that the defendant is bound by all of the acts and representations of Munroe as his agent. There is, however, no evidence in the record tending to establish the fact of such agency, or that Munroe had any authority from the defendant, except the testimony of the plaintiff’s father that Munroe stated to him that he was such agent; and the rule is of long standing that the declarations of a person claiming to be the agent of another are insufficient to establish such agency or the terms of his authority. (Civ. Code, sec. 2319 (2); *Sav. etc. Soc. v. Gerichten*, 64 Cal. 520, (2 Pac. 405); *Smith v. Liverpool etc. Ins. Co.* 107 Cal. 432, (40 Pac. 540). On the other hand, the defendant testified that Munroe was not his agent, and that he had never employed or authorized him to act as his agent for the sale of any property; that he never had any dealings with anyone in connection with the Oakland property, or any conversation with anyone about its purchase or sale, or the payment of any encumbrance thereon, and had never had in his possession any paper or instrument referring to it, or known anything about the property



until the commencement of this suit, and Munroe himself testified that he had never acted as the agent of the defendant, and did not act as his agent in the transaction of December, 1899, and did not at that time state to the plaintiff's father that he was his agent. One who deals with another, upon his mere statement that he is the agent of a third person, takes upon himself the risk of being able to show that such agency existed (*McDonald v. Cool*, 134 Cal. 502, (66 Pac. 727)). If, instead of satisfying himself thereof by independent investigation, he accepts such statement and is deceived, he is the victim of his own credulity. The testimony of these declarations was inadmissible for the purpose of proving such agency and should have been excluded by the court upon the defendant's objection thereto, and when received should not have been considered."

*Pease v. Fink*, 3 Cal. App. 371, 379, 380.

A two cent stamp, a fifty cent telegram, or a one dollar telephone message, from Skinner to Frank at San Francisco, would have settled, easily and promptly, the character of the Briggs' agency, and the scope of his authority: but against inert unprogressiveness even the gods themselves fight unvictorious.

The learned judge of the court below must, himself, have appreciated Mr. Briggs' lack of authority to bind the defendant company: this is evidenced by his ruling excluding what for brevity we call the "Briggs' Contract": but that does not cure the harm done by permitting that to be done indirectly which could not have been done directly; and the action of the learned judge in permitting repeated references to this unauthorized Briggs' Contract, after having held it inadmissible, was particularly prejudicial to the defendant below and deprived it of that fair trial according to law to which it was entitled.



4. The Court Erred in Permitting the Ex Post Facto Opinions of Reed, an Unauthorized Person, to Be Laid Before the Jury, Although Such Opinions Concerned Past Events, and Were Not Within the Scope of Any Authority Possessed by Him.

*Assignments 30-31, 41, 71.*

The objectionable matter here complained of is exhibited in the following transcript from the record:

“Mr. SWING. Q. At the time Albert J. Reed quit, “ if he did, on December 20, state what, if anything, he “ said at the time he quit.

“A. When Mr. Reed quit?

“Q. Yes.

“Mr. PARKE. We object to that as incompetent, irrelevant and immaterial; and there is no evidence before “ this court of any kind, nature or description that “ Reed was agent of the Sharples Separator Company.

“Said objection was then and there overruled by said “ court, to which ruling said defendant Sharples Separator Company, a corporation, then and there duly “ excepted, and now assigns said ruling as error.

“Exception Number 14-A.

“The WITNESS. A. The first intimation that I had “ that Mr. Reed was going to quit, I walked into the “ corral and there was one of the cows showed that “ she was not feeling good, and I was in a hurry and “ was going to the ranch, and I said, ‘Mr. Reed, is that “ ‘cow sick?’ He said, ‘Look at her bag’. And I just “ stopped, and it was a heifer and the bag was all “ swollen up, and I didn’t say a word, and Mr. Reed “ didn’t for half a minute, and then Mr. Reed said,

“ ‘Skinner, I am going to quit; I have ruined the last  
 “ ‘cow with this machine that I expect to ruin’. He  
 “ quit, and I took him to town, and after he got to  
 “ town the first thing he did he went in and talked to  
 “ Mr. Edgar. He made in my presence a statement to  
 “ Mr. Edgar regarding his ability or inability to run  
 “ the machine.

“The WITNESS (continuing). Reed quit. After he  
 “ went in town, he sent Mr. Frank a telegram. I saw  
 “ the telegram written; it was written by Mr. Reed.

“Q. Do you know his handwriting; are you able to  
 “ identify that (handing paper to the witness)?

“A. It is very much like it. I believe it is.

“Mr. SWING. We offer now in evidence the copy  
 “ written by Reed which is attached to this deposition  
 “ in which Reed testified in his handwriting, and which  
 “ he wrote, and also the original furnished by the com-  
 “ pany, which is word for word like this. I offer the  
 “ two.

“Mr. PARKE. We object to that as incompetent, irrel-  
 “ evant and immaterial; and further that no evidence  
 “ is before the court that Reed was agent for the  
 “ Sharples Separator Company, or any other employee  
 “ at this time.

“Said objection was then and there overruled, by  
 “ said court, to which said ruling said defendant  
 “ Sharples Separator Company, a corporation, then and  
 “ there duly excepted and now assigns the same as  
 “ error.

“Exception Number 15.

“Mr. SWING. I wil read this to the jury:

“ ‘Dated El Centro, California, December 18, 1914.’

“ (Reading:) ‘Sharples Separator Co., 420 Mission

“ ‘Street, San Francisco. Have done everything possi-

“ ‘ble. Serious trouble started again. Taking too big

“ ‘risk to continue use of machine. We have dis-

“ ‘cussed every possible phase of situation, but quit

“ ‘milking, safest way, or we will have too big a loss,

“ ‘according to our agreement. Will await instruc-

“ ‘tions here. Wire at once. Albert J. Reed.’

“Said telegram was then and there marked by the  
“ clerk as Plaintiff’s Exhibit 5.”

The disclosures of the record, from the beginning, place Mr. Reed within the same general category as Mr. Briggs, and wholly fail to show that he was either an agent of the company, or such an agent that his declarations could bind the company. Like Mr. Briggs, he was at most merely an employee whose duties were mechanical—limited to the installation and operation of the machines: it nowhere appears that he had authority to sell or warrant: it nowhere appears that he was invested with any commercial, as opposed to mechanical, authority; and it was no part of his business to proclaim his personal *ex post facto* or other opinions about any or every matter that might have come under his observation.

On page 118, Skinner tells us that “the Sharples  
“ people sent Mr. Reed to install the machine” and that he did so: clearly, Skinner did not consider Reed as appearing on the scene in any other than a mechanical capacity; and although, in stating that the Sharples



people sent Mr. Reed, Mr. Skinner was stating, not a fact within his knowledge, but a nude conclusion, yet the drapery with which he sought to clothe that conclusion, was the drapery of mechanics, but nothing more. And so throughout the Skinner testimony, we find Reed associated solely with the machine and its operation, but invested with no superior authority: on page 119, Reed tells Skinner about the *modus operandi* of obtaining and attaching another unit to the machine: on page 121, upon his return in June, Reed “proceeded to take charge of the milking machine”: on page 128, upon his return in October, Reed “did all the using (of the machine): he did everything to it: I never touched it. \* \* \* Reed came and took charge of the machine” (129). \* \* \* “Mr. Reed had absolute control of it; I had nothing to do with it at all” (129-130); and at page 133, we are told that, upon the memorable occasion when Reed “quit”, “he made in my presence a statement to Mr. Edgar regarding his ability or inability to run the machine”. Mr. Skinner did no “trading” with Mr. Reed: as Skinner says, on page 136, “I did not trade with Mr. Reed: I did not consider Mr. Reed in it at all”: on page 145 Mr. Skinner tells us that “Mr. Reed instructed me and my son and the young man that worked for me named Allen, as to the manner in which the machine should be operated when he first installed it”; and on page 149, we learn that “after I found that my cows had caked bags, I did not use this machine upon them, only at Mr. Reed’s directions”. The remainder of the testimony in

the cause is, so far as concerns the scope of Reed's activity, upon the same lines: nothing could be clearer upon this point than Reed's own deposition, taken at Skinner's instance; nowhere does Reed pretend to claim that he was a commercial or business agent of the defendant company; and nowhere throughout the case can be found any proof that Reed was anything more than a mere mechanical employee "working" (247) for defendant, within the scope of whose employment was not embraced any authority to make contracts, declarations or representations binding upon the company. In a word, Reed was no higher in rank in the company than Briggs: Reed neither possessed nor exercised any authority superior to that of Briggs: no distinction to the advantage of Reed is possible as between him and Briggs: any ruling of the lower court good as to Briggs would be equally good as to Reed; and if the contracts, declarations or representations of Briggs were properly excluded because of lack of authority in Briggs, then, by a parity of reason, similar activities by Reed should have been similarly excluded. Upon what principle any distinction could have been drawn by the learned judge between Briggs and Reed, we must confess our inability to understand: upon what principle Reed's declarations are admissible, but those of Briggs inadmissible, we cannot fathom: neither was more than a mechanical employee wholly unauthorized to bind the company in any way; and if the ruling excluding the Briggs agreement was sound, as it plainly was, its philosophy should have excluded, not only the repeated permitted and encouraged refer-



ences to the excluded material, of which we have complained, but also declarations of Reed that were prejudicial to the defendant below in the ultimate degree.

There is no testimony in this cause to show that from October 20th to the end of the year, Reed was anything more than a mere mechanical employe of the company; and, in special reference to the point under discussion, there is nothing to show that, included within the scope of this employment, was any authority to bind the company by any declaration, contract or representation. Reed himself makes no claim of this sort; he states that from October 20th to December 20th, he was at the Skinner premises “*to take charge of the mechanical milker. I was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time, I operated the milker*” (246-7); and Reed makes no pretence that at any time his “working” had any other scope than this mechanical one. And even so far as his claim of “working” for the company is concerned, he is contradicted by Mr. Frank, the sales manager, who states: “I know Albert J. Reed. He was with the Sharples Separator Company as *a milking machine expert* for a period of about nine months, and his employment ended with us prior to October, 1914. I think he had not been working for us for two or three weeks prior to October 20, 1914; his account had been squared up and been checked out. *Mr. Reed was engaged to install milking machines and to instruct the purchasers of the same in their proper use.* He worked under the direc-



“ tion of the San Francisco office. He might have  
“ been working for us some time in October, but was  
“ not working for us on October 20, 1914, or there-  
“ after; I could not say how long before October 20.  
“ My best judgment is that he was not working for  
“ us for two or three weeks before the 20th of October,  
“ 1914. I do not know whether or not Reed went  
“ to the ranch of W. W. Skinner during the month of  
“ October, 1914. Mr. Reed left the San Francisco  
“ office, and it is my belief that he left for the W. W.  
“ Skinner ranch. He came in to call upon me before  
“ he went to the ranch of W. W. Skinner. I advised  
“ Mr. Reed that if he would call upon Mr. W. W.  
“ Skinner he could undoubtedly secure employment with  
“ him as *a milking machine operator*; at that time  
“ Mr. Reed was not in the employ of the Sharples  
“ Separator Company. At the time when Mr. Reed  
“ was at the ranch of W. W. Skinner in October,  
“ November and December, 1914, I do not know in  
“ whose employ he was; he was not in the employ  
“ of the Sharples Separator Company. I didn't send  
“ Reed to the ranch of W. W. Skinner, as an employee  
“ of the Sharpless Separator Company. On October 20,  
“ 1914, when Reed went to the place of W. W. Skinner  
“ at El Centro, Reed was no longer in the employ  
“ of the Sharples Separator Company, and I gave him  
“ no instructions as to what his future work would be,  
“ but suggested to him that if he was looking for  
“ employment he could possibly obtain it from W. W.  
“ Skinner. I did not give him any instructions to go  
“ back to the Skinner place and restart the milking  
“ machine and endeavor to get it running right, because

“ he was not in the employ of the Sharples Separator “Company” (253-4). And so, with Skinner himself: speaking of the period in question, Skinner broadly admits that “I do not know who selected Reed to “*operate that machine*” (131-2)—a piece of testimony which, in addition to its other characteristics, exhibits Skinner’s own understanding that the function of Reed was the mechanical one of “operating that machine”. Skinner then goes on to say: “Mr. Briggs asked me “ when he wanted to send a man if I had any preference as to whom he sent. I told him I did not; I “ said ‘You will do’. He said, ‘I can’t do it, I am “ ‘too high priced a man; the company would not “ ‘leave me here anyhow; I have no time; how will “ ‘Reed do?’ I said, ‘Reed will do all right; you can “ ‘send anybody you want. It is up to you people, “ ‘the Sharples Separator Company’ ” (132). But there is nothing here to establish that Reed was such an agent of the company that the company should fairly be bound by any of his deliverances, or to establish that he was anything more than a mechanician. As we have seen, Briggs was not authorized to bind the company by his contracts, representations or declarations, and so the learned judge below held: no declaration of Briggs to Skinner, then, whether in this conversation or otherwise, could bind the company; and it was not within the scope of the employment of either Briggs or Reed to do so. And in the next place, there is nothing in this conversation which Skinner undertakes to repeat with such extraordinary accuracy, which

indicates any purpose upon Briggs' part to send to Skinner even a company machinist: Briggs went no farther than to ask Skinner how Reed would do: but Skinner nowhere asserts that Reed was sent, or considered by himself, Skinner, even as the company's machinist, the position taken by Skinner being that "I do not know who selected Reed to operate that "machine" (131-2). And moreover, the fact that Reed was in communication with Frank falls entirely short of establishing Reed to be such an agent of the company that the latter should be bound by his declarations, written or oral contractual or otherwise. It was Reed's business, whether as Skinner's employee (256-7), or as a mechanic dealing with this make of mechanical milker, to keep in communication with the company that made the milker: the circumstance that Reed was at one time an employee of the company does not mean that his correspondence with Frank re-created that relation; and manifestly, the fact that Briggs—himself without authority to bind the company—suggested Reed's name to Skinner, cannot saddle this company with an agent authorized to bind the company by his declarations, particularly when this individual, as the sales manager's testimony shows (253), had not, even as a machinist, been working for the company for two or three weeks prior to October 20, 1914. We have, then, clearly, the right to invoke the rule, as against Reed, that before proof can be made of his representations, statements or admissions, it is essential that the fact that he was an agent at



the time of making them shall either be admitted or be shown in evidence by making a *prima facie* case.

*California Code Civil Procedure*, Sec. 1870,  
Subd. 5;

*Mechem, Agency*, Sec. 1774;

*Union Const. Co. v. W. U. Tel. Co.*, 163 Cal. 298;

*Smith v. Liverpool Ins. Co.* 107 id. 432, 437;

*Bender-Martin Co. v. Apollo Co.*, 101 N. Y. S. 75.

But even upon the hypothesis that Reed was an agent of the company upon and subsequent to October 20, 1914,—that he was something more than a mere mechanic employed to install machines,—the case of the plaintiff below could not prosper, and the action of the court in receiving Reed's declarations would still be prejudicially erroneous; and this, for the plain reason that this very objectionable, incompetent and injurious declaration itself, as made by Reed, shows upon its face that it was made when the assumed agency came to an end. Skinner had been testifying about the correspondence between Reed and Frank, when the following significant question was put to him,

“Mr. SWING. Q. At the time Albert J. Reed quit, “if he did, on December 20, state what, if anything, “he said at the time he quit.

“A. When Mr. Reed quit?

“Q. Yes” (132).

This very question presupposed an occurrence “at “the time he quit”, which the examiner desired stated, and this view is substantiated by Skinner's testimony to the effect that Reed announced “ ‘Skinner, I am going “ ‘to quit; I have ruined the last cow with this machine

“ ‘that I expect to ruin’. He quit, and I took him to “town” (133). Even then, if we assume Reed to have been an actual agent of the company, and even if we further assume that his agency was such that the company would be bound by his declarations, still, are his declarations, made after his announcement that the connection is severed—that the assumed agency in the particular matter was at an end,—to be received to bind this company? Will this court allow an employe, who finds that he cannot do the work given him to do, to make admissions of the most injurious character when announcing that he is “quitting”? If Reed ever was an agent of the company authorized to bind it by his contracts, representations, admissions or declarations—which we deny—still, it is clear from the objectionable question itself, and from the reply of Skinner thereto, that the incompetent declarations were made when the assumed agency came to an end; and while it seems almost pedantic to cite authority for the proposition that the declarations of a former agent, made when the agency came to an end, are wholly incompetent and inadmissible against the former principal, yet the following may be consulted:

*Vicksburg Ry. v. O'Brien*, 119 U. S. 99;

*Kenah v. The John Markee*, 3 Fed. 45;

*Mararae v. T. P. Ry.*, 124 id. 45;

*Walker Mfg. Co. v. Knox*, 136 id. 335;

*Woolsey v. Haines*, 165 Fed. 391;

*Birch v. Hale*, 99 Cal. 300;

*Lissak v. Crocker Estate Co.*, 119 id. 442;

*Boone v. Oakland Transit Co.*, 139 id. 492;

*Luman v. Golden Co.*, 140 Cal. 709;  
*Haven v. Brown*, 22 A. D. 208;  
*Hallheimer v. Brinckerhoff*, 21 id. 155;  
*City Bank v. Bateman*, 7 Harr. & J. (Md.) 104;  
*Parker v. Green*, 8 Metc. 102; 11 Q. B. 46;  
*Waldeck & Co. v. P. C. S. S. Co.*, 2 Cal. App.  
 167, 169.

In *Birch v. Hale*, supra, the Supreme Court said:

“The admission or declaration of an agent binds his principal ‘only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act and part of the *res gestae* that it is admissible at all’. (Greenleaf on Evid., sec. 113.) ‘An agent is empowered to act for the principal, but has no power to make admissions to bind him unless these admissions constitute a part of the *res gestae*’. (Garfield v. Knight’s etc. W. Co., 14 Cal. 36.) ‘The admissions of an agent, not connected with the transaction to which they refer, cannot bind his principal even though made in explanation of an act previously done by him while in the exercise of his agency \* \* \*. The declarations of an agent or servant do not in general bind the principal. To be admissible \* \* \* they must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time’. (Beasley v. San Jose F. P. Co., 92 Cal. 388.)

It does not appear that the architect was still the agent of appellant when the admission sought to be proved was made, if made at all, nor does it appear that it related to a transaction then depending and was thus a part of the *res gestae*. On the contrary, the question plainly implied that it related to a past transaction. This being so, the objection should have been sustained and the evidence excluded.”

*Birch v. Hale*, 99 Cal. 300.



In *Lissack v. Crocker Estate Co.*, supra, which was a case involving an elevator accident, a witness on behalf of the plaintiff was permitted, against the objection of the defendant to give a conversation which he had had with the man in charge of the elevator, and the Supreme Court pointed out that:

“This conversation was had after the elevator had stopped in its fall, and after the plaintiff had been taken out of the cage, and formed no part of the *res gestae* and should have been excluded. It was only a statement of what had occurred and the defendant was not bound thereby. \* \* \* It cannot be said that this was an immaterial error”.

*Lissak v. Crocker Estate Co.*, 119 id. 444.

Again, by *Boone v. Oakland Transit Co.*, the double viciousness of the error now complained of, may be illustrated. There, the Supreme Court said:

“Over the objection of the defendant, a witness was allowed to testify that when the car stopped after the accident, and after the conductor had gone from the place where it stopped to the place where the plaintiff lay, and again returned to the car, the witness had a conversation with him, in which he said: ‘These ladies seem to blame me—seem to think it is my fault’. This was not a part of the *res gestae*. It happened after the accident, and after a sufficient time had elapsed for the defendant to walk almost half a block and back again. It was not even a relation of the facts which caused the accident, but was a mere statement of the opinion of third persons as to who was at fault. Its admission was against all the rules with relation to *res gestae*. Nor can it be said that the testimony was not injurious. Its effect was to get before the jury the opinions of the persons who saw the accident that the cause was the fault of the conductor,—that is, that it was due to his neglect. Such opinions, expressed at the time, are likely

to have great weight with a jury. There can be no question that the opinion of a witness who saw the accident, whether or not it was caused by the negligence of the defendant, would not be admissible, and would be injurious if allowed. With much more reason can it be said that hearsay statements as to the opinions of third persons, not placed upon the witness-stand, and not subject to cross-examination, are both inadmissible and injurious, if directed to a material point in the case.”

*Boone v. Oakland Transit Co.*, 139 Cal. 490, 493.

And finally, not to multiply quotations upon this point, attention may be directed to *Luman v. Golden Ancient Channel Min. Co.*, supra, where the following statement of the law was made by the Supreme Court:

“It appeared that the plaintiff was brought out of the shaft several minutes after the occurrence of the accident. It having been shown that Haskins, the superintendent, was present at the time, the plaintiff was asked: ‘Did you make an inquiry of Mr. Smith at the time in regard to what caused the accident, and, if so, state what your inquiry was, and what was his reply?’ This was objected to upon the ground that the declaration of Smith could not bind the corporation, and the objection was sustained. The plaintiff then offered to prove, for the purpose of rebutting the evidence as to negligence of the fellow-servant, ‘that about ten minutes after the occurrence, and as soon as he reached the top of the shaft, he asked the brakeman, ‘How did it happen?’ The brakeman said in the presence of Mr. Haskins that ‘The clutch flew out, the machinery gave way,’ and that the brake would not hold it. Mr. Haskins replied, ‘Yes, because I saw him put the clutch in place, throw the clutch in place.’ This was objected to as irrelevant, immaterial, and incompetent, and the objection was sustained. Haskins was the superintendent of the mine, in charge of the works. It is not claimed that this testimony was offered for the purpose of impeaching the wit-



ness Haskins, and no foundation was laid for any impeachment. It was explicitly stated that the object was to rebut the testimony of negligence of the fellow-servant. The objections were properly sustained. Any declarations which might have been then made by either Smith or Haskins constituted no part of the *res gestae*. Haskins, the superintendent of the mine, had no more power to bind his employer, the defendant corporation, by admissions as to the cause of the accident than had Smith, the man operating the lever and the brake. He was not the defendant corporation, and did not represent it for the purpose of making admissions as to the cause of the accident that had already occurred. If he made an admission as to such cause, he was not in doing so performing on behalf of the defendant corporation any duty by law imposed upon it, and was not, as to such admission, the representative of his employer. The admissions of an agent are not binding, unless they are made not only during the continuance of the agency, but in regard to a transaction then pending at the very time they are made."

*Luman v. Golden Ancient Channel M. Co.*, 140 Cal. Rep. 700, 709.

And so, with the telegram; it was equally incompetent hearsay, no part of the *res gestae*, and an *ex post facto* opinion of Reed in no way binding upon the company. Speaking of this telegram, Mr. Skinner advises us that it was even later in time than the declaration that "I have ruined the last cow with this machine that I expect to ruin"; and he tells us: "He quit and I took him into town. \* \* \* Reed quit. After he went in town, he sent Mr. Frank a telegram" (133); and clearly, therefore, this telegram episode occurred after Reed had abandoned his undertaking, whether with the company or with Skinner; and the telegram was not only inadmissible but highly prejudicial to the



company as a glance at its contents will disclose. And moreover, no proof was made of the receipt of the telegram by the company, or, what is more to the point, that the company acted upon or acknowledged it in any way whatsoever. No proof is made that this telegram was ever confirmed or ratified by the defendant company, nor was any proof made that the defendant company ever acquiesced in the contents of this alleged telegram: but is it not the law that before messages sent *to* a party can be used against him, there must be, not only evidence that he received the messages, but also proof of some act, reply or statement evidencing acquiescence in their contents? What respectable authority takes the ground that the omission to reply is an admission of the truth of any matter stated in the message (*Jones, Evidence*, Sec. 269, p. 336)? Is it not the rule that a telegram not answered or acted on is neither admissible as *res gestae*, nor as an implied admission of its contents (*Packer v. U. S.*, 106 Fed. 906)? And, for a further illustration, is not the admission of unanswered incriminating messages written by a *particeps criminis*, prejudicial error (*Marshall v. U. S.*, 109 Fed. 511)? Indeed, it is the settled law that where messages, whether telegrams or letters, are sent to a person, they are not evidence of the truth of their contents, or binding upon the receiver, unless, besides the mere possession of the message, there is proof of acquiescence in it; and in the absence of proof of acts evidencing acquiescence in the contents of the message, the message is the

merest hearsay. In support of this proposition, see, among other cases, the following:

*Smith v. Shoemaker*, 84 U. S. (17 Wall.) 630;  
*Sorensen v. U. S.*, 168 Federal, 785, 794-7;  
*People v. Colburn*, 105 Cal. 648;  
*Casey v. Leggett*, 125 id. 673-4;  
*People v. Lee Dick Lung*, 129 id. 491, 492;  
*Razor v. Razor*, 36 N. E. (Ill.) 963, 964;  
*Payne v. Com.*, 31 Gratt. (Va.) 855, 859;  
*Com. v. Eastman*, 48 Am. Dec. (Mass.) 596;  
*Learned v. Tillotson*, 97 N. Y. ,1);  
*State v. Shive*, 51 Pac. (Kan.) 274.

But again: even if we go the length of assuming that the declarations and telegram of Reed occurred prior to the termination of this assumed agency, still they would not be competent as against this defendant company. In order to bind a principal, an agent's declarations are admissible only so far as the agent has authority (*W. U. Tel. Co. v. Way*, 4 So. (Ala.) 844; *Barry v. Ins. Co.*, 29 N. W. (Mich.) 31; *Ruggles v. Ins. Co.*, 11 A. S. R. 674): the declarations must be made in the line of the agent's duty and within the scope of his authority (*Weeks v. Inhabitants*, 31 N. E. (Mass.) 8; *Pittsburgh Co. v. Kirkpatrick*, 52 N. W. (Mich.) 628; *Van Doren v. Bailey*, 51 N. W. (Minn.) 375): the declarations must be made during the continuance of the agency, with regard to a transaction then pending; they must be, not only within the agent's authority, but also part of the *res gestae*—must accompany an act that the agent was authorized to do, and his declarations after his acts have ceased—when he

has "quit"—are inadmissible hearsay and mere narratives of a past event (11 Q. B. 46: 8 Bingh. 451: *Haven v. Brown*, 22 A. D. 208: *Thallheimer v. Brinckerhoff*, 21 id. 155: *City Bank v. Bateman*, 7 Harr. & J. (Md.) 104: *Parker v. Green*, 8 Metc. 142: *Hannay v. Stewart*, 6 Watts, Pa., 487: *Woods v. Banks*, 14 N. H. 101: *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29: *Raiford v. French*, 11 Rich. (S. C.) 367; *Winter v. Burt*, 31 Ala. 33: *Burgess v. Inhabitants*, 7 Gray 345; *Vail v. Judson*, 4 E. D. Smith (N. Y.) 165: *Idaho etc. Co. v. Ins. Co.*, 17 L. R. A. 586); and these rules are supported by the Federal cases (*Merchants Bk. v. Bk. of Columbia*, 5 Wheat. 336: *Union etc. Co. v. Robinson*, 79 Fed. 420: *Cliquot's Champagne*, 3 Wall. 114, 140: *Goetz v. Bank*, 119 U. S. 551: *Vicksburg Ry. v. O'Brien*, 119 U. S. 99: *R. P. Ry. v. Kempton*, 138 Fed. 992: *Xenia Bank v. Stewart*, 114 U. S. 224). In this connection the language of the opinion in *Goehrig v. Stryker*, 174 Fed. 897, is apropos:

"Admissions of an agent, to be admissible, must be in the course of his agency, and be concerned with the furtherance of it. Mere declarations after the fact, and unconnected with the prosecution of his agency are no more admissible against his principal than those of an entire stranger. The subject is very much confused by the efforts which are constantly being made to get in the statements of an agent, under the guise of their being part of the *res gestae*. But they are admissible as such only when they enter into the occurrence as a constituent fact, and not as mere declaration, and where this is not the case they have no evidentiary value. After the transaction is complete, any statement with regard to it, from whatever source, becomes purely descriptive of the event, and are not within the province of the agent to make; his agency not being to that end."



And see also, *Vicksburg Ry. v. O'Brien*, 119 U. S. 99, where the Supreme Court said:

“His declaration after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of 18 miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestae*—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestae*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it.”

See also, *Packet Co. v. Clough*, 87 U. S. 528, where it was said by the same court:

“A captain of a passenger ship is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal or any servant of his principal has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. \* \* \* An act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of past occurrence, or by an isolated conversation held, or an isolated act done at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the ‘*res gestae*’ ”.

And the case last cited was approved as authoritative in a later case in the same court, where the court said:

“The third assignment is of more importance. The plaintiffs were allowed in the cross-examination of one of the defendants’ witnesses to ask whether one Dearing, the general traveling agent and supervisor of the defendants in the Southern States, did not, some time after the death of Dillard, and after he had made an examination of the claim of the plaintiffs, express an opinion that it should be paid. To this question the witness replied that Dearing had expressed his opinion that it would be best for the defendants to accept the situation and pay the amount of the policy. That such an opinion allowed to go to the jury must have been very hurtful to the defendant’s case is manifest, and that it was inadmissible is equally clear. The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals; and this doubly true when the agent was not a party to those occurrences. We have so recently discussed this subject in *Packet Co. v. Clough* that it is needless to say more. For the error in receiving this evidence the judgment must be reversed.”

*Amer. L. & I. Co. v Mahone*, 88 U. S. (21 Wall.) 152, 157.

This, then, is the law with regard to declarations of *fact* made by an agent: they must be made contemporaneously with the act to which they refer: if the act be a past event, no subsequent characterization of it, no subsequent assertion of fact concerning it, is admissible; and the declarations of Reed, both to Skinner and as contained in the telegram, are obnoxious to these rules. But the instant case presents a situation in which the declarations are even less competent, because they are declarations, not of fact,

but of the asserted agent's mere opinions—declarations of a sort wholly beyond the scope of any asserted agency. The situation here recalls that presented in *Fidelity and Casualty Co. v. Haines*, 111 Fed. 337. In that case, the plaintiff went to the defendant's agent to insure against burglary: later, a burglary was committed upon his premises: the defendant's agent declared that the plaintiff was insured against the loss: the admission of this declaration was held to be error, the Circuit Court of Appeals saying:

“This was nothing but his individual opinion or conclusion, which he was neither authorized to make, to form nor to express for his company. \* \* \* What he said was not a part of the things done in closing the agreement. It did not even rise to the dignity of a narrative of a past event. It was nothing but his conclusion as to the legal effect of the things that had been done by his company, Haines and himself before the burglary.

“A principal is not bound by the opinions or conclusions of its agent which it does not empower him to form or to express on its behalf.

“Many other questions are presented by the assignments of error, but it is unnecessary to a decision of this case to determine them, because the ruling already considered was material, erroneous and fatal to the verdict.”

And so, in *Plymouth Co. Bk. v. Gilman*, 44 A. S. R. 782, this point of view is recognized, the court saying:

“But while we think it was competent to give the statement of the cashier as to any *fact* relating to the collection of the notes, we are of the opinion that it was not competent to give his statements that the failure to collect the notes was the ‘fault’ and ‘neglect’ of the bank. Those were not the statements of the facts relating to the collection or non-collection of the notes, but



an expression of the mere opinion of the cashier as to the conduct of the bank. It was no part of his duty as cashier, or in the line of his duty, to express any opinion as to the performance or failure to perform its obligations to the defendant. \* \* \* The statement \* \* \* was very material, and this court cannot say that the admission of this testimony did not unjustly prejudice the plaintiff's case. That question was one for the jury to decide upon all the facts in the case, uninfluenced by a statement of an officer of the bank as to his opinion of the conduct of the bank."

The point here made, which suggests the double viciousness of the error now complained of may further be illustrated by the language of the Supreme Court of the State of California, in *Boone v. Oakland Transit Co.*, 139 Cal. 490, 492-3, where that court said:

"Over the objection of the defendant, a witness was allowed to testify that when the car stopped after the accident, and after the conductor had gone from the place where it stopped to the place where the plaintiff lay, and again returned to the car, the witness had a conversation with him, in which he said: 'These ladies seem to blame me—seem to think it is my fault.' This was not a part of the *res gestae*. It happened after the accident, and after a sufficient time had elapsed for the defendant to walk almost half a block and back again. *It was not even a relation of the facts which caused the accident, but was a mere statement of the opinion of third persons as to who was at fault.* Its admission was against all the rules with relation to *res gestae*. Nor can it be said that the testimony was not injurious. Its effect was to get before the jury the opinions of the persons who saw the accident that the cause was the fault of the conductor,—that is, that it was due to his neglect. *Such opinions, expressed at the time, are likely to have great weight with a jury. There can be no question that the opinion of a witness who saw the accident, whether or not it was caused by the negligence*

*of the defendant, would not be admissible, and would be injurious if allowed. With much more reason can it be said that hearsay statements as to the opinions of third persons, not placed upon the witness-stand, and not subject to cross-examination, are both inadmissible and injurious, if directed to a material point in the case."*

In other words, even in a case where the declaration is made by a person who is really the agent of the party against whom the declarations is offered, the declaration does not become competent simply because of the relation of agency: the offered declaration must be a statement of fact made in furtherance and within the scope of the agency, and contemporaneously with the occurrence of the fact; but a statement of opinion, wholly gratuitous from any point of view, and expressing merely the agent's personal opinion or idea concerning the effect of some past transaction, or the manner in which some past act occurred or has been performed, is not admissible at all. In a word, Reed's statement to Skinner was clearly only an expression of his personal opinion as to the effect of completed acts; and his telegram stands upon the same footing, and is equally inadmissible; and both the declaration and the telegram occurred when any relation between Reed and the company—assuming that any relation ever existed,—came to an end by Reed's own act.

**5. The Court Below Erred in Striking from the Testimony of Mr. Frank the Statement, "And I Believe that Reed Notified Skinner of this Fact, Too."**

*Assignment 72.*

It is proper here to point out that Mr. Frank did not testify in person at the trial below. In anticipation



of the trial, his deposition had been taken on behalf of the company (251 *ad finem*); the statement stricken out by the learned judge below was, without objection, made as part of that deposition; and that statement was not made as part of the direct examination, but was elicited by the plaintiff below upon cross-examination. When this deposition came to be read at the trial below, the plaintiff then for the first time indicated dissatisfaction with his own handiwork, and asked the court to strike out a statement which he had himself elicited from the deponent; and in making his motion to strike out, the plaintiff below stated no ground, vouchsafed no reason, and did no more than to make a bald request to the court, which request the court complied with. We submit that such procedure as this should not be countenanced. We submit that the grounds of a motion to strike out, should be plainly stated, so that, in fairness to court and counsel, an opportunity may be afforded to remedy any defect that may really be. The statement of the grounds upon which the motion proceeds, would at once disclose any existing defect; and if a defect were present, it could, should the situation permit, be at once obviated. But the contrary course, whereby a point, ground or reason is

“held in ambush till the case has reached this court, when it came out in the open,”

*T. & P. Ry. v. Lacey*, 185 Fed. 226,

is fully as reprehensible as the practice whereby one

“is to object with a rattle of words that conceal the real nature of an objection capable of being removed on



the spot, and to announce its true character for the first time in the appellate court.”

*N. Y. etc. Co. v. Blair*, 79 Fed. 896.

In the present predicament, the testimony came into the deposition in response to the plaintiff's own inquiries: he was alone responsible for its presence; and when at the trial he sought to expunge it, he failed to state any ground to justify his repudiation of that which he had himself developed (*Tabor v. Bank*, 62 Fed. 383; *Thomas China Co. v. C. W. Raymond Co.*, 135 id. 25). It is the law that where no ground of objection is set forth, an objection is unavailing (*Toplitz v. Hedden*, 146 U. S. 252): vague objections are without weight, because the objector should point out some specific defect, and is confined to his specific objection (*Dist. Col. v. Woodbury*, 136 U. S. 450: *Moore v. Bank*, 38 id. 302: *Woodbury Co. v. Keith*, 101 id. 479): and where a particular objection is specified, it is considered that all others are waived, or that there was no ground upon which the others could stand (*Evanston v. Gunn*, 99 U. S. 660). It may, indeed, be said to be the settled law of the Federal courts that a motion of this sort should be of such a specific character as to indicate distinctly the grounds upon which the moveant relies, so as to give the other side full opportunity to obviate them, if under any circumstances that can be done (*Noonans Caledonia Gold Mg. Co.*, 12 U. S. 393, 400: *Patrick v. Graham*, 132 id. 627, 629: *Dist Col. v. Woodbury*, 136 id. 450, 462: *Toplitz v. Hedden*, 146 id. 252, 255: *Chicago Ry. v. De Clou*, 124 Fed. 142: *Guarantee Co. v. Phoenix Ins. Co.*, id 170: *Davidson S. S. Co. v.*

*U. S.*, 142 id. 315: *Shandrew v. Chicago Ry.*, id. 320, 321-2: *Sparks v. Terr.*, 146 id. 371: *Am. Car Co. v. Brinkman*, id. 712). A mere nude request to the court to strike out certain testimony is not, therefore, in the absence of some substantial legal reason, enough: such procedure should be classified with the abortive "I object", which, for any legal purpose, is equivalent to silence (*Bishop v. Wight*, 221 Fed. 392, 397).

In the next place, in casting about for some possible explanation of this ruling, one might hazard the guess that because the form of expression adopted by the witness was "and I believe that Reed", etc., therefore the learned judge below considered that the witness was testifying to hearsay. If this was hearsay, it was hearsay elicited by the very party who, later, moved to strike it out: but we submit that it is not lightly to be assumed that a statement is hearsay because ushered in by the phrase "I believe". Every lawyer of experience knows how prone witnesses are to use such phrases as "I believe", "I considered", "I judge", "I understand", "I take it", etc.; and it by no means follows that because a witness may chance to employ one of these familiar phrases, he is therefore relating, not facts within his personal knowledge, but the tales of others. To suggest but a single natural hypothesis fairly arising upon admitted facts: that Mr. Frank had met Mr. Skinner, that he had talked with him and had discussed with him the very matters involved in this action (135), cannot be disputed: if in that discussion, Mr. Skinner had notified Mr. Frank of Reed's attitude, no one would pretend that this declaration



of the party plaintiff was hearsay: what is there here to show that these were not the facts upon which Mr. Frank rested his statement? “Reed advised me “of Skinner’s attitude”, says Mr. Frank: what was there to impede Skinner from advising Mr. Frank of Reed’s attitude?

In many cases, it has been held to be a sufficient answer to a motion to strike out that the evidence was received without objection: but in the cause at bar we have the added feature that the fact sought to be stricken out was not only received without objection, but was actually elicited by the moveant himself; and under such circumstances, we submit that the moveant should be estopped from expunging that which he himself introduced. If it be true that

“counsel must not be permitted to wink at the introduction of evidence to which they think there is a valid objection, hoping that it may benefit them, and, if it goes the other way, move to exclude it”

(*Rush v. French*, 25 Pac. (Ariz.) 816-822-3: cited with approval in 1 *Wigmore on Evidence*, 57); if it be true that

“parties will not be permitted to lie by and keep silent when evidence is offered”

*Polidori v. Neuman*, 116 Cal. 375;

if it be true that

“It is entirely clear that a party who has sat by during the reception of incompetent evidence without properly objecting thereto, and thus taken his chance of advantage to be derived by him therefrom, has not, when he finds



such evidence prejudicial, a legal right to require the same to be stricken out”

*Le Coulteux de Caumont v. Morgan*, 9 N. E. (N. Y.) 861-865;

if it be true that

“a party against whom a witness is called and examined cannot, as was done in the cause at bar, lie by, and speculate on the chances, first learning what the witness testifies, and then, when he finds the testimony unsatisfactory, object either to the competency of the witness, or to the form or substance of his testimony”

*Westervelt v. Burns*, 57 N. Y. S. 749-750:

if all this be true, and that it is true all the books agree, upon what principle may a litigant voluntarily develop evidence and then, upon a mere unreasoned request, succeed in eliminating it? May it not be reasonably urged that one who voluntarily introduces evidence of certain facts is thereby estopped to object to the consequences of his own voluntary action (see, by way of analogy, *Bogk v. Gassert*, 149 U. S. 17; *Sun Printing Assn. v. Edwards*, 113 Fed. 445; *Warren Live Stock Co. v. Farr*, 102 id. 116)? The relations between Skinner and Reed were not irrelevant, and were part of the history of the case: Skinner had repudiated the suggestion that Reed was working for him, but not for the company, saying, *inter alia*, “I did not trade with Mr. Reed: I did not consider “Mr. Reed in it at all” (136): Frank explains that “shortly after Reed went down there on October 20, “1914, he asked Skinner for his salary or part of it. “Then Mr. Skinner advised him that he, Reed, was “working for the Sharples Separator Company, and

“ Reed advised me of Skinner’s attitude, and I advised Reed that such was not the case, that he was working for Skinner” (256-7): all of this was developed by the plaintiff himself; and it was the plaintiff himself who brought out the fact of Reed’s notification to Skinner that he was working for Skinner but not for the company,—a fact which by no means adds any increased value to Reed’s belated assertion in his deposition that “I was working at that time for the Sharples Separator Company” (246-7); and in view of these circumstances, it may not be amiss to point out that the view which we are urging formed, as we believe, the *ratio decidendi* of the Diaz case. There, the Supreme Court said:

“It is objected that the accused was deprived of the right, secured to him by section 5 of the Philippine civil government act, *supra*, ‘to meet the witnesses face to face’, in that the judgment of conviction for homicide was rested in part upon the testimony produced before the justice of the peace at the trial for assault and battery and at the preliminary investigation. But this objection overlooks the circumstances in which the record wherein that testimony was set forth was received in evidence. It was not offered by the government, but by the accused, and was offered without qualification or restriction. And it is otherwise manifest that the offer included the testimony embodied in the record as well as the recitals of what was done by the justice. It was all received just as it was offered, no objection being interposed by the government. In some respects the testimony was favorable to the accused and in others favorable to the government. It included a statement by the accused, who refrained from testifying in the court of first instance, and also the report of an autopsy which was favorable to him. In these circumstances the testimony was rightly treated as admitted generally, as applicable to any issue which it tended to prove, and as



equally available to the government and the accused. *Sears v. Starbird*, 78 Cal. 225, 230, 20 Pac., 547; *Diversy v. Kellogg*, 44 Ill. 114, 121, 92 Am. Dec. 154. True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay, and, second because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible. And of the fact that it came from witnesses who were not present at the trial, it is to be observed that the right of confrontation secured by the Philippine civil government act is in the nature of a privilege extended to the accused, rather than a restriction upon him (*State v. McNeil*, 33 La. Ann., 1332, 1335), and that he is free to assert it or to waive it, as to him may seem advantageous.” \* \* \*

As here the accused, by his voluntary act, placed in evidence the testimony disclosed by the record in question, and thereby sought to obtain an advantage from it, he waived his right of confrontation as to that testimony, and cannot now complain of its consideration.”

*Diaz v. U. S.*, 223 U. S. 422-449-450, 452-453.

**6. The Court Erred in Excluding Evidence of the Operation of the Sharples Mechanical Milker at Westchester, Pennsylvania, and at San Leandro, California.**

*Assignments 35, 38, 39.*

This plaintiff in error makes but one kind of mechanical milker. As Briggs tells us, “I am in the  
 “employ of the Sharples Separator Company, and  
 “familiar with their milking machine. They do not  
 “make more than one kind of milking machines; all  
 “machines are like the one here before me, identical;



“and that was true in 1914” (231): this testimony is nowhere disputed: it has received corroboration and support, both directly and indirectly, throughout the record (see as an example of this, Reed, 233-4); and it may be taken as an accepted fact in this cause that all Sharples mechanical milkers were, during the period here involved, to employ Briggs’ terms, “identical”. And Skinner’s own testimony, at page 136, as to the four units being “identically alike”, fully supports and confirms Briggs’ statement.

This being so; and it being the claim of the plaintiff below that, although properly operated in accordance with the instructions of the company, yet the milker did not operate conformably to the terms of the asserted guarantee; and it being the claim of the defendant below that any failure of the milker to give the requisite service was attributable, not to any shortcoming of the machine, but to the failure of Skinner properly to operate the same in the mode and manner required by, and “subject to the conditions of sale”, as those several conditions are formulated and specified in Exhibit 1 (112-114):—the defendant below sought to show that other milking machines, identical with that which the company sold to Mr. Skinner, had, when properly operated, furnished the requisite service in accord with the guarantee under which they were sold. The admission of the evidence was resisted by the plaintiff below as far as Westchester, Pa., was concerned, upon the ground that how other machines worked is not admissible to show compliance with the “warranty”, and the ground that it was incompetent,

“irrelevant and immaterial how some other machine “worked”, “and on the additional ground that no “foundation has been laid” (Assignment 35). And so far as San Leandro, California, was concerned, similarity of conditions was for the first time suggested to the lower court as the ground for exclusion, in an objection which seems to confuse the two discrepant conceptions of similarity and identity (Assignment 38); and when, in pursuance of the same effort, the defendant below sought to develop the results of the operation of the machine so far as the production of milk is concerned, the only objection presented was that “it “is incompetent, irrelevant and immaterial” (Assignment 39),—an objection which means nothing (*Noonan v. Caledonia Gold Mg. Co.*, 121 U. S. 393, 400).

When opposing the admission of this evidence, so far as Westchester was concerned, the objection was made “that no foundation has been laid”; but just what was intended to be conveyed by this enigmatic utterance, we are unable to determine, because, to employ Justice Field’s expression, it fails to “indicate distinctly” (*Noonan v. Caledonia Co.*, 121 U. S. 393, 400) any specific defect in the foundation for the question—if any such defect existed and had been “indicated distinctly”, it might turn out to have been “an objection capable of being removed on the spot” (*N. Y. etc. Co. v. Blair*, 79 Fed. 896), and the defendant below was entitled at least to the opportunity to do so if he could. This view of this objection becomes important when we consider that Dr. Hart, an experienced veterinarian whose qualifications were formally con-



ceded by the plaintiff below (189-190), had seen the milker in operation, and had examined the udders of cows upon which it had been used, and had—as a matter of professional interest, not being an employee of plaintiff in error—visited Westchester and made an examination there (Assignment 35): what further “foundation” could rationally have been desired?

But, still dealing with the Westchester phase, not only does the objection as to lack of foundation evaporate upon examination, but no claim whatever was made that the evidence was objectionable because of dissimilarity of conditions—*non constat* but that, had even a hint of this been given, similarity of conditions could and would readily have been shown. As already observed, vague objections to testimony are without weight for the pregnant reasons that all objections should point out some specific defect, the objector is confined to his specific objection, and it is considered either that all other objections are waived, or that there was no ground upon which they could stand. Since, therefore, the objection as to “no foundation” is itself without foundation in the particulars and for the reasons given, and since no objection based upon similarity or dissimilarity of conditions was made, the case, as to Westchester, comes solely to this, that “evidence as to how other machines worked is not “admissible to show compliance with the warranty”. In other words, the question raised is this: in a case in which an objection based upon lack of foundation must be disregarded, and which is wholly uncomplicated by any consideration suggested by similarity or dis-



similarity of conditions, is evidence by comparison so stripped of any degree of probative force that it should be rejected? If not, then the learned judge erred in excluding evidence which might well have turned the scale in favor of defendant below—no man, indeed, could rightly say that it would not.

When we turn to the San Leandro phase, we are for the first time confronted with the thought of the similarity of conditions—though here, as already pointed out, similarity and identity seem to be treated as terms equivalent in signification, the language of the objection being, “our objections to the offer as it “*now* stands are that it does not include any offer to “show that the conditions under which this machine “was operated were similar or identical with those “under which the machine of the plaintiff was operated” (Assignment 38). Very obviously, this objection implies that, similarity of conditions being given, the foundation of the objection, and the objection with it, would crumble; and consequently, the point of interest here is the similarity of the conditions.

In what mental attitude are we to approach the consideration of the question thus raised? Shall we make that approach with minds closed to the value of inferential evidence, or shall we yield to the modern tendency, both of legislation and of judicial decision, to give as wide a scope as possible to the investigation of facts? Surely there can be but a single answer to this question. Mr. Herbert Spencer, the great thinker who so recently departed, has told us something of the relativity of knowledge: but experience teaches that

there is a relativity of facts as well. An isolated fact can scarcely be imagined: for facts are related like men, both antecedently and subsequently; and there is in all human situations, a train or sequence in the facts that make them up. While every transaction creates new relations, yet it is itself the birth or product of antecedent circumstances: it is this consideration which enables us to see in what goes before, the preparation, or seed, of what is to follow after; and hence the utility of considering circumstances which make antecedently probable a given or claimed consequence.

The authorities fully recognize the value of the probabilities in a cause; and as a consequence, the modern test of relevancy is liberality itself, particularly in causes depending upon circumstantial evidence.

“As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inference it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. The modern tendency, both of legislation and of the decisions of the courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.”

*Holmes v. Goldsmith*, 147 U. S. 150, 164.

Remarking upon the relativity of facts, Greenleaf observes:

“The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature.”

*1 Greenleaf, Evidence, 16th Ed., Sec. 108.*

Speaking of moral coincidences, a learned court said:

“Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other; and circumstances, altogether inconclusive if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.”

*Continental Ins. Co. v. Ins. Co. of Penn., 51 Fed. 884, 887.*

Speaking of antecedent probabilities, the law upon the subject is thus summed up by the Supreme Court of Indiana:

“It is a rule of elementary logic, as well as of rudimentary law, that evidence which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force.”

*State v. Marvin, 95 Ind. 465; and see, also, Rugg v. Rohrbach, 110 Ill. App. 532.*



And these views are supported by our own local courts:

“The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury; and in determining the relevancy of evidence that may be offered upon an issue of fact much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not. Mr. Thayer, in the introduction to his ‘Cases on Evidence’ says: ‘No precise or universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience’; and Mr. Stephen in his ‘Digest of the Law of Evidence,’ says (Chapter 1): ‘The word relevant means that any two facts to which it is applied are so related to each other that, according to the common course of events, the one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.’

\* \* \* Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or non-existence of a fact. In civil cases, a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them. Hence, any evidence tending to show either of these conditions is relevant to the issue to be determined by them. ‘If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.’ ”

*Moody v. Pierano*, 4 Cal. App. 411, 418, 420.

We respectfully submit, therefore, that in the light of these authorities, and in the light of the history

disclosed in the record in this cause and attempted to be related in our general statement of the case, and particularly in the light of the testimony of Mr. Briggs that the defendant company "do not make " more than one kind of milking machine; all machines " are like the one here before me, identical; and that " was true in 1914" (231), the questions thus raised should be approached in the spirit suggested by the modern tendencies of the law of evidence, that no supernatural smilarity of conditions should be demanded, that a reasonable similarity of conditions should suffice, and that, given such reasonable similarity, evidence showing the successful operation of the defendant company's machine elsewhere, would be relevant and material in the cause at bar, and would, in the language of the Supreme Court of the United States, at least,

"tend, in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth"

*Holmes v. Goldsmith*, supra.

And while this language just quoted illustrates the extent to which the Supreme Court goes in this direction, it is not to be inferred from our quotation of the language that in our opinion the evidence being discussed would tend only "in a slight degree", or "remotely", to a determination founded in truth: on the contrary, we contend that had the evidence under discussion been admitted by the learned judge of the court below, it would have induced a verdict contrary to that which is now being attacked.

Usually, upon an issue of compliance with a warranty, the contention of the vendor is that the article sold is



good, and that of the vendee is that it is bad: as an item of evidence tending to support his contention, the vendor shows that other like things—in this case “identical” things (231)—are good; and it must be plain that this “evidence by comparison” creates and justifies a strong inference of the similarity of the subjects of comparison. It cannot, we submit, be denied that evidence by comparison has probative force: no reasonable person can fail to see the probative force of proof that the “identical” machines have been successfully operated in many other instances; and while evidence that other machines were operated successfully might not have the effect of conclusively establishing that this machine was capable of successful operation, yet it would nevertheless tend strongly to establish that the machine was suited to the ends for which it was made, and that the alleged failure asserted in this instance was the result, not of any non-compliance with the alleged warranty, but of some fault in the manner of its operation by Skinner or of some failure upon his part to comply with the “conditions of sale”; or, on the other hand, such evidence would tend strongly to show that the alleged injuries to the cows were not the result of the operation of the machine, but were entirely due to the presence of infectious mammitis generated by insanitary environment, as contended by the defendant below. If a buyer complains that the flour delivered to him at the mill is sour and unfit, but the miller shows that he delivered to other customers flour of the same grade from the same bin, and these other customers testify that they



found the flour sound and sweet, does it not seem reasonably fair to say that the flour was probably good? So likewise, if the maker of a harvester proves that he sold a number of harvesters of the same pattern that season, and the buyers testify that these all worked well, is not this reasonable proof that there is no real defect in the machine, and that the machines were carefully made and carefully looked over before shipment? In view of the modern tendency to give as wide a scope as possible to the investigation of facts, why should evidence of this character be rejected? Such evidence is quite as fair to one side as to the other—to the buyer as to the seller; if the seller may show other machines to be good, the buyer may show other machines to be bad; and even though it may not, in and of itself, standing alone, and uncomplicated by any other fact or circumstance, conclusively establish compliance with the alleged warranty, yet that objection would go, not to its admissibility, but to its weight; and it may well be, in easily imagined, evenly balanced cases, that this evidence by comparison, when considered not only in itself but also in connection with other facts and circumstances appearing in the cause, would become of commanding and decisive significance. As observed by the court in *Baker v. Rickart*, 52 Ind. 594, where it was held that the seller may show the efficiency of a patent ditching machine warranted to do certain work in a certain county in Ohio, by proving the quantity and quality of work done by machines of the same pattern and construction in a certain county in Illinois:

“The weight of such evidence would greatly depend upon the difference in the soil and other surroundings of

the two places. Such a machine might perform well in one character of soil, and yet would fail in another and different character of soil. Evidence ought not to be excluded because it is entitled to but little weight and consideration. The difference between the competency and weight of evidence is marked and clearly defined. That which is competent, whether weak or strong, should be admitted. Evidence which tends to prove some fact in issue is admissible. We think the evidence is competent."

It may, indeed, be said that, by the general weight of authority, proof by comparison is admissible, provided only that the similarity of the subjects of comparison is reasonably sufficient to give the result of the comparison some probative force; and here, the subjects of comparison were not only similar, but they were "identical".

There is a generalization in *City of Bloomington v. Legg*, which formulates the theory of this matter. There the court said:

"Where an issue is made as to the safety of any machinery or work of man's construction, which is for practical use, the manner in which it has served that purpose, when put to that use, would be a matter material to the issue; and ordinary experience of that practical use, and the effect of such use, bears directly upon such issue. It no more presents a collateral issue than any other evidence that calls for a reply which bears on the main issue. Such evidence is held competent by the weight of authority. *Coke Co. v. Graham*, 35 Ill. 346; *City of Chicago v. Powers*, 42 Ill. 170; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933; *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840; *Darling v. Westmoreland*, 52 N. H. 401. The same rule is adopted in Georgia, Alabama, Connecticut, Minnesota, Michigan, and other states."

*City of Bloomington v. Legg*, 37 N. E. (Ill.) 696, 697.



This matter has received the attention of the Supreme Court of the United States in a cause, wherein that learned court took the ground that, the quality of goods furnished at a given time by the plaintiff to the defendant being in question, it is competent for the plaintiff to show that the quality of like articles furnished at the same time by him to another party was good, if such evidence be followed by evidence that the goods furnished by him at that time to such other party and the goods furnished by him at that time to the defendant were of the same kind and quality (*Ames v. Quimby*, 106 U. S. 342): in a Massachusetts case, Mr. Justice Holmes took the ground that where the plaintiff sought to show, as in the present instance (127), that the defendant's article was worthless for the purpose for which it was intended to be used, the defendant had the right to meet that claim by the testimony of users of the same article supporting its usefulness (*Reeve v. Dennett*, 11 N. E. (Mass.) 938).

In a recent case, the court, after pointing out that the first question presented related to the ruling of the lower court to the effect that the plaintiff could not show that other apparatus similar in character to the one which plaintiff had sold defendant, when properly operated, satisfactorily heated the buildings in which they were installed, proceeded to say:

“Bearing in mind that it was the contention of the defendant that, though properly operated in accordance with the instructions of the plaintiff, the heater would not heat the defendant's school house in accordance with the terms of the guarantee, and that the plaintiff claimed that any failure of the heater to give the requisite service was attributable solely to a failure on the part of the



defendant to properly operate the same, we are of opinion that this testimony was admissible.”

*Waterman-Waterbury Co. v. School District*, 148 N. W. (Mich.) 673.

In an Iowa case, it was held that upon an issue as to the sufficiency of a heating apparatus to properly warm a building, where it was claimed that its failure was due to the faulty construction of the building, and to the failure of the plaintiffs to put it in proper condition so that it might be heated by the amount of radiation which the defendants agreed to furnish, evidence of the comparative results obtained from such plant, and another subsequently replaced in the same building is admissible (*Kramer v. Messner*, 62 N. W. (Iowa), 1142): in a Massachusetts case, in an action for the price of a loom attachment, sold under agreement that it should work successfully, the evidence was conflicting on the point whether it did so work, and the plaintiff was permitted against the defendant's objection, after introducing evidence that the defendant's loom and another loom were substantially alike in their mechanical arrangements. though differing somewhat in details, to put in evidence that the attachment had worked successfully on the latter loom, but the evidence as to the similarity of the two looms was conflicting, and it was held that the evidence objected to was rightly admitted, and that the question of the similarity of the two looms was properly submitted to the jury (*Brierly v. Davol Mills*, 128 Mass. 291); and in an Indiana case, it was said by the appellate court that

“objection is also made to the admission of evidence to show that other furnaces installed by appellee, furnished heat satisfactorily. There was testimony to the effect that the furnace did not supply heat as agreed. The evidence objected to was properly admitted to show the capacity of the furnace to furnish the guaranteed amount of heat”, citing many cases.

*Beach v. Huntsman*, 85 N. E. (Ind.) 523, 525-6.

In illustration of the proposition that the rule for which we are contending is just as fair to the buyer as it is to the seller, see:

*Hazelhurst Compress Co. v. Boomer Compress Co.*, 48 Fed. 803;

*Lyon v. Martin*, 2 Pac. (Kan.) 790;

*Sandwich Mfg. Co. v. Nicholson*, 13 id. 597;

*Dempster Mfg. Co. v. Fitzwater*, 49 id. 624.

And see, generally, as supporting the view for which we are contending, the following cases, among others:

*Findley v. Pertz*, 74 Fed. 681;

*Ward v. Blake Mfg. Co.*, 56 id. 437;

*Acme Cycle Co. v. Clark*, 61 N. E. (Ind.) 561;

*Davis v. Oakland Chemical Co.*, 105 N. Y. S. 693;

*Frereich v. Gemmon*, 11 N. W. (Minn.) 88;

*Luetgert v. Volker*, 39 N. E. (Ill.) 113;

*Barnett v. Hagen*, 108 Pac. Co. (Idaho), 743;

*Paulson v. D. M. Osborne Co.*, 27 N. W. (Minn.) 203;

*Avery v. Burrall*, 77 N. W. (Mich.) 272;

*Nat. B. & L. Co. v. Dunn*, 6 N. E. (Ind.) 131.

It is, we submit, no answer to our complaint as to the exclusion of this Westchester testimony to say that in one or two other places in the record references may

be found to the successful operation of other milking machines of the plaintiff in error: no objection of this character was made to the excluded testimony: it would be a somewhat novel proposition that a litigant must be restricted to a single channel of proof, no matter what the circumstances; and a claim of that character would be reminiscent of the antiquated and debilitated subterfuge whereby it is sought to break the force of testimony by admitting the fact sought to be proved—a proceeding concerning which the Supreme Court of Maine observes:

“It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice, in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts—to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.”

*Dunning v. Maine Cent. Ry.*, 39 Atl. (Me.) 352, 356.

We respectfully insist, therefore, that should any indirect references be found in the record to the successful operation of other machines of the company, such references would furnish no valid reason why the defendant below should not have availed itself of this Westchester testimony or should have been denied the benefit of it; and the view for which we are contending was recognized in a well-considered decision by a court of high standing. The case was one of tort, brought to recover damages for personal injuries received by the plaintiff when seeking to use an elevator maintained



in a prominent building rented to various tenants, but the ownership of which was admitted by the defendants. The defendants had a verdict below, and the case went up on exceptions taken, *inter alia*, by the plaintiff to the exclusion of certain evidence offered by him. It appeared that the defendant, though admitting ownership of the building, yet denied control over the elevator at the time of the accident, and in order to establish such control, the plaintiff formally offered to show that shortly before the accident the defendants had procured a policy of indemnity insurance against loss or damage from accidents happening in operating the elevator, and that such insurance was in force when the plaintiff was injured,—the obvious argument being that the defendants would not have deemed it prudent to secure indemnity insurance on an elevator not within their control, or for the careless management or defective condition of which they could not be held responsible. This evidence was excluded below, but the Supreme Judicial Court held that proof of any act of the defendants whom it was sought to hold, tending to show the exercise by them of dominion over either the premises containing the elevator, or the elevator itself, was competent and admissible, and that the exclusion of the plaintiff's offer of proof was erroneous. The court, in this opinion, formulated the principle to which we appeal, in the following language:

“The fact that there was uncontradicted testimony, which, if believed, was amply sufficient to prove that the defendants had not relinquished, but retained, such control, does not cure the error, *for the plaintiff was entitled to the full benefit of any and all relevant and material evidence properly offered by him upon the issue.* Nor

can it be held that the large discretionary powers of the Superior Court include the right to reject evidence at a jury trial, when regularly offered, because, in the opinion of the presiding judge, sufficient proof, if believed, has already been introduced to establish the fact to be proved."

*Perkins v. Rice*, 72 N. E. (Mass.) 323, 325.

So far as this Westchester phase is concerned, no objection was made that the conditions were not shown to have been similar: that objection was presented for the first time when the successful operation of the San Leandro machines was sought to be shown; and as then presented, the objection was that the defendant below did not show that the conditions under which the San Leandro machines were operated were "*similar or identical*" with those under which Mr. Skinner's machine was operated. No discrimination between similarity and identity of conditions was made in the ruling of the learned judge excluding the proffered evidence, and one can only conjecture as to the ground upon which the ruling proceeded; but if the learned judge based his ruling upon the theory that the conditions should have been "*identical*", this would have been to demand the accomplishment of an impossibility, and to have arrayed himself in opposition to all of the relevant authorities. And while the authorities speak of similarity of conditions, yet they do not demand any unreasonable, supernatural or ideal similarity; all that is required is that the similarity of the subjects of comparison is reasonably sufficient to give the result of the comparison some probative force. (*Finley v. Pertz*, 74 Fed. 681; *Baber v. Rickard*, 52 Ind. 594; *Ward*



*v. Blake Mfg. Co.*, 66 Fed. 437; *Brierly v. Davol Mills*, 138 Mass. 291; *Beach v. Huntsman*, 85 N. E. Ind. 523); and as observed by the Supreme Court of Indiana (*Baber v. Rickart*, 52 Ind. 594),

“The difference between the competency and weight of evidence is marked and clearly defined. That which is competent, whether weak or strong, should be admitted”;

and it would be the province of the jury to appraise the probative force of the evidence—to determine its weight and the effect to be given to it.

In the cause at bar, it is the contention of the defendant in error that his dairy was a normal Imperial Valley dairy—a dairy fairly representative of Imperial Valley dairy standards; he claims that upon this dairy he had a perfectly normal herd of cows; he admits the mechanical milker in question to have been the regular Sharples mechanical milker; and he makes no attempt to dispute in any way, but on the contrary confirms (136), the statement of Briggs that “I am in the “employ of the Sharples Separator Company, and “familiar with their milking machine. They do not “make more than one kind of milking machines; all “machines are like the one here before me, identical; “and that was true in 1914” (231):—in such a situation what conditions can be material except the presence of the machine and the cow? Given the cow and the mechanical milker, no other circumstance or condition can possibly be material except fault or carelessness of the person operating the milker, disregard of the “conditions of sale” subject to which the milker was sold, or the presence of contagious disease engendered by insanitary environment, the operation of which is



independent of the milker. But these latter conditions the defendant in error persistently denies: what conditions then are material except the presence of the milker and the milkee? The objection made below, upon which the exclusion of this testimony was effected, could not have been addressed to any difference in dairy management or environment. So far as this feature is concerned, and what is here said is quite as true of Westchester as of San Leandro,—the dairy management and environment at San Leandro were either worse or better than those at the Skinner dairy. If those conditions upon the San Leandro dairy were worse than the corresponding conditions upon the Skinner dairy, this would very plainly strengthen the inference, in favor of defendant below, to be derived from the fact that, notwithstanding the worse conditions, the machines had been successfully operated (see in this connection the remarks of the court in *Kramer v. Messner*, 69 N. W. (Iowa) 1142, 1144). And if, upon the other hand, it was the Skinner dairy that was in a bad condition, this would tend to establish the contention of the defendant below that the alleged injuries to the animals in question resulted from faulty and careless management and insanitary environment, and not at all from any inherent quality of the machine—it would show that the alleged condition of the cows was due to Skinner's failure properly to comply with the "Conditions of Sale", or to infection generated by insanitary surroundings, or to both causes. And finally, what possible effect can either climate or geographical location have upon the operation of a mechanical milker upon a cow? Assuming that no two climates are in

all respects exactly similar, the cow remains the cow, the machine continues to be "identical", and the process of withdrawing the milk continues unchanged, no matter what the geographical location may be: difference of latitude necessitates no alteration of these elements; and in numerous cases in which a breach of warranty like the present has been alleged, evidence of the operation of similar machines has been admitted, without any suggestion that geography or climate can have any possible bearing upon the case, and without any requirement that similarity of conditions in that regard should be shown. All that is necessary is, indeed, that similar machines should be doing similar work, and it is not even required that the machines themselves should be in all respects identical.

The following cases, *inter alia*, support, we think, the contention which we are here making:

*Frohreich v. Gemmon*, 11 N. W. (Minn.) 88;

*Waterman-Waterbury v. School District*, 148 N. W. (Mich.) 673;

*National Bank v. Dunn*, 6 N. E. (Ind.) 131;

*Acme Cycle Co. v. Clark*, 61 N. E. 561;

*Glaeser v. Hoeffner*, 68 Mo. App. 158;

*Beach v. Huntsman*, 85 N. E. 523.

Clearly, if the defendant below had been permitted to show that the mechanical milker had been operated successfully in every locality into which it had been introduced, and that the only trouble with cows had occurred in Imperial Valley, this would have tended strongly to the conclusion that the Imperial Valley cattle were in fact diseased, as contended by the defend-

ant below: the exclusion of this evidence left the jury with the alleged Imperial Valley failures alone before them for consideration, withheld from the jury the numerous instances of success elsewhere, and wholly prevented from appearing the true significance of the isolation of Imperial Valley in respect of the condition of disease so earnestly contended for by the defendant below; and the defendant below was, we submit, entitled to go to the jury upon the proposition that when the dairy situation in Imperial Valley is viewed in comparison with, and in contrast to, the absence of any injurious effect by the mechanical milker upon the cows anywhere else, the conclusion that the true cause of the situation upon Skinner's dairy was disease generated by the conditions there, is strikingly intensified.

“The reason of the thing” and the great weight of authority are, therefore, in favor of the position taken by the defendant below, and opposed to the ruling of the learned judge here criticised. In the State of California, the condition of the law upon this point impresses us as being unsettled. In *Fox v. Harvester Works*, 83 Cal. 333, 343, it was held that

in an action for damages for breach of a contract of sale of harvesting machines manufactured by the defendant, which were warranted to do good work, and concerning the working of which certain representations and guarantees are alleged to have been made, whereby the purchase was induced, evidence for the defendant to the effect that other machines made of the same pattern and of like materials did good work, is not admissible,

and as the opinion shows, this ruling was made, apparently, without any analysis or even citation of authority. The ruling seems to have been based upon four reasons,



the bases of which have already been discussed in this brief. The first of these reasons was that the working of other machines was an "outside" issue: but, as we have seen, according to modern conceptions of evidence, nothing which can throw light upon a controverted issue is "outside", and relevancy is a matter, not of law, but of logic. This criticism meets the second reason also, namely, that while other machines may have worked well, the one in question may not,—a reason which ignores every consideration suggested by relevant, that is, logical, inferences, and the wide scope given to the investigation of facts. The third reason given is that the conditions may not have been the same: but that aspect of the matter has also been discussed heretofore in this brief. And the fourth reason given is that the other machines may have been better built,—a reason squarely met by the uncontradicted testimony of Briggs, confirmed by Skinner (136), to the effect that all of the machines made by the plaintiff in error were "identical" (231). The case of *Stockton etc. Works v. Glens etc. Co.*, 121 Cal. 167, may be passed by with the remark that it was but an echo of the Fox case, and contributed no addition of any importance to the literature of this subject.

Then came the case of *Yick Sung v. Herman*, 2 Cal. App. 633, in which we begin to perceive a departure from the views of the Fox case.

The case last cited was an action to recover for certain potatoes alleged to have been sold by plaintiff to defendant, and in which the defendant set up that the potatoes were not up to the quality specified in the con-

tract. The contract in the case called for potatoes which were to be sound and merchantable, and of fancy quality, and it was dated November 20, 1902. During the course of the trial a witness named McMillan was placed upon the stand by the plaintiff for the purpose of showing that he saw the plaintiff digging and sacking certain potatoes between November 20th and December 1, 1902, and that the condition of the potatoes he saw was good; and the appellate court held that the lower court did not commit error in overruling the defendant's objections to this testimony. In passing upon the matter, the court observed that

“In view of the fact that there was testimony tending to show that the land was all of *about* the same quality, and the potatoes all *about* the same, the evidence was competent. It was *about* the time that plaintiff was digging and delivering the potatoes to defendants.”

Then followed the more recent case of *North Alaskan etc. Co. v. Hobbs Wall & Co.*, 159 Cal. 380, in which certain evidence as to the condition of other articles was excluded for the reason that there was an absence of similarity of conditions, the court saying:

“It is claimed that the court erred in sustaining objections to certain questions asked of the witnesses Wall and Hotchkiss. It was the theory of the defendant that the rusting of the cans after they were packed in the boxes furnished by the defendant was not caused by the wetness or dampness of the boxes, but by drops of moisture which were left upon the cans by the American Can Company in manufacturing them. These witnesses testified that they had examined a number of cans made by the can company for the plaintiff and found upon them beads of moisture, indicating that they were damp from some defect in the making of the cans. They then testified that they saw other crates filled with cans which it is conceded



were not a part of the cans manufactured for the plaintiff. With regard to these they were asked: 'What was the condition of these cans as to showing moisture?' Objection was made that the evidence was irrelevant and immaterial, since the cans referred to were not of those manufactured for the plaintiff. This objection was sustained and the ruling was assigned as error. We think the ruling was correct. *There was no offer to show and it did not appear that the cans to which the question referred were manufactured in the same manner or by the same process as those supplied for the plaintiff.* The evidence was clearly collateral and irrelevant to the issue."

Plainly, as we read this opinion, if it had appeared that the cans to which the question referred were manufactured in the same manner or by the same process as those supplied for the plaintiff, the evidence would have been neither collateral nor irrelevant to the issue: but in the cause at bar we have uncontradicted evidence that the milking machines referred to were manufactured in the same manner and by the same process as that supplied to the defendant in error—indeed, as Briggs has testified without contradiction that all the milking machines used by the present plaintiff in error were "identical"—so "identical", indeed, that Skinner could not tell them apart (136). In other words, as we read this most recent California case, we interpret it as postulating the admissibility of the proposed evidence provided a reasonable similarity of conditions appears.

But, not only is *Fox v. Harvester Works*, 83 Cal. 333, opposed to the weight of authority upon this question, but the question itself is one upon which the Federal courts will exercise their own independent judgment. If it be said that in matters regulated by State statute,



the Federal courts will enforce such State statutes within the appropriate jurisdiction, the obvious reply is that so far as the present inquiry is concerned, no State statute is in existence applicable to the matter in hand.

In other words, it is proper to point out that the courts of the United States are not controlled, upon matters governed by the general principles of jurisprudence, by the views entertained by any particular State; and therefore the decisions of State courts upon such matters, no State statute thereon having been enacted, are not controlling upon the Federal courts (*Town of Venice v. Murdock*, 92 U. S. 494; *Genoa v. Woodruff*, id. 502; *Chicago v. Robbins*, 67 id. (2 Black) 418; *Swift v. Tyron*, 41 id. (16 Pet.) 1; *Goodman v. Simmons*, 61 id. (20 How.) 243; *Mercer County v. Hackett*, 68 id. (1 Wall.) 83; *U. S. v. Muscatine*, 75 id. (8 Wall.) 575; *Pine Grove v. Talcum*, 86 id. (19 Wall.) 666; *Oates v. National Bank*, 100 id. 239; *Brooklyn Ry. v. Nat'l Bank*, 102 id. 14; *Burgess v. Seligman*, 107 id. 20; *Poma v. Fowler*, id. 529).

Questions relating to the law of evidence, except as qualified by an actual State statute, covering the particular matter in hand, are regarded as questions of general law as to which the Federal courts will follow their own independent judgment, irrespective of the decision of the State court. While conceding that Federal courts must enforce the provisions of the local statute of the state in which the action arises, unless that statute be in conflict with some law of the United States, we nevertheless insist it to be the law that the decisions of a State court construing common law rules

of evidence are not obligatory upon the Federal courts, that the Federal courts will not be governed by such decisions when they appear to be at variance with the great weight of authority, and that generally the decisions of the State court are not controlling upon the Federal courts as to questions relating to the law of evidence (*U. P. Ry. v. Yates*, 79 Fed. 584; *Chicago etc. Ry. Co. v. Kendel*, 167 id. 62; *Young v. Lowry*, 192 id. 825; *First Natl. Bank v. Liewer*, 187 id. 16; *Chicago etc. Ry. v. Price*, 97 id. 423; *Hemingway v. Ill. Central Ry.*, 114 id. 843; *Van Vleet v. Sledge*, 45 id. 743; *North-ern Natl. Bank v. Hoopes*, 98 id. 935).

Thus, in *Guernsey v. Imperial Bank*, the Circuit Court of Appeals, for the Eighth Circuit, speaking through Judge Sanborn declared:

“It is the duty of Federal Courts which they may not renounce, to form independent opinions and to render independent judgments upon questions of commercial law, of general law, and of right under the Constitution and laws of the Nation. Every citizen of the United States who has the right to prosecute his suit in a federal court, has also the right to the independent opinion and decision of that Court upon every determining question of commercial or general law which he presents for its consideration.”

*Guernsey v. Imperial Bk.*, 188 Fed. 300.

And see, also:

*Trieste Co. v. Friedman*, 169 id. 1.

## 7. The Lower Court Erred in Preventing Evidence of the Exclusion of Imperial Valley Dairy Products from Los Angeles.

It has heretofore in our general statement of this case been pointed out that Mr. Skinner was no more



progressive or advanced, in the matter of sanitary dairy conditions, than his fellow-dairymen of Imperial Valley. The evidence shows Mr. Skinner to be upon a par with the other dairymen, at least until the end of 1913 or the beginning of 1914: it shows that he was content to follow their methods: it showed no effort upon his part to improve upon the usual local conditions; and it showed an attitude so unsympathetic to improvement that the expenditure of even ten dollars for better sanitation was not countenanced. Not only, then, was Mr. Skinner content to share the primitive conceptions of his fellow-dairymen, but his insensibility to his sanitary responsibilities was fully reflected in the insanitary condition of his premises and his cattle; and this phase of the matter has also been discussed in our general statement of the case. These things being so, the dairy conditions in Imperial Valley, during the year 1914, were such that milk and dairy products were not permitted to be shipped from Imperial Valley to Los Angeles City for consumption (Assignments 36, 74): in view of the disclosures of this record, it would have been extraordinary if such shipment were permitted; but when this plaintiff in error sought to show this condition of fact, it was prevented from doing so.

The plaintiff in error made two attempts in this direction, but these attempts were made under different conditions. The first occurred during the direct examination of Dr. Hart, who was entirely familiar with the facts, being the Los Angeles City veterinarian, a position which he had held for six years at the time of the trial, and a professional gentleman whose qualifications



were conceded (189-190). Dr. Hart was asked whether, during 1914, milk or any other dairy products from Imperial Valley were permitted by the City of Los Angeles to be shipped there for consumption; and the solitary objection that was made to this inquiry was the stereotyped futility "incompetent, irrelevant and immaterial". No other, different or additional objection was presented; beyond this useless generality, no reason was given to justify the exclusion of this evidence; and we need not repeat here what we have already said as to the inefficiency of such an objection. The evidence was, however, excluded.

The second attempt occurred during the cross-examination of the plaintiff's witness Nye; and the ruling repelling the attempt was, we think, more erroneous, if possible, than that made during the testimony of Dr. Hart. Mr. Nye had been an inspector for the State Dairy Bureau: his duties included the inspection of the sanitary condition of dairies: he had visited Mr. Skinner's dairy; and he declared that "the sanitary condition of that dairy was good" (263). Contrary to other witnesses, he never found a mudhole in the corrals or around the buildings, the barn was clean, the water holes were so arranged that cattle could drink from them without getting into them, "and the water was "as clear as we have ever been able to get water in "the Imperial Valley" (263). He then indulges in the merely negative statement that he never saw any stock or foreign matter in the ponds of any description,—a statement perfectly consistent with the presence of animals and foreign matter in the "ponds", and a state-

ment which by no means establishes that no cattle or foreign matter got into the "ponds", especially since Mr. Nye had never visited Mr. Skinner's premises prior to September, 1914 (263). And he tells us that the milking machine was "always clean and sweet smelling", although Skinner himself tells us that in October, 1914, when Reed and Briggs were there, "the machine had gotten dirty" (129), and although Nye himself tells us he was upon the Skinner premises "about the middle of October, 1914" (263); and he states that the other utensils also "were always clean and sweet smelling" (263-4), although we know from Skinner, Reed, et al., that the only washing they ever got was in the bacteria-tainted water from the Colorado river. Mr. Nye is, however, constrained to admit that the cows "once in a while" would be "a little muddy" (264): that "a cement floor does make the dairy that much cleaner" (id.): that "if they milk cows in the yard, and only "clean the droppings out once a month, that would not "be a sanitary dairy" (id.: compare, for example, Skinner, 152, 157-8): that "it is more sanitary when "they have a wooden or cement floor: a cement floor is "considered the most sanitary" (id.): that stanchions "are an advantage or benefit to a dairy barn, whether "you use a milking machine or not" (id.); and that he "would not consider a dairy which had a mudhole a "sanitary dairy" (265: compare, for example, Reed, 238).

This hurried résumé of Mr. Nye's testimony will, we think, throw light upon the ruling complained of. Mr. Nye was produced to support Mr. Skinner's claim that

the sanitary condition of his dairy was good: beyond that sanitary condition, Mr. Nye did not attempt to go; upon cross-examination he was asked whether the dairy conditions in Imperial Valley, during 1914, were not such that milk and dairy products from there were not permitted to be shipped into Los Angeles City for consumption; and the solitary objections made to this inquiry were "incompetent, irrelevant and immaterial and not proper cross-examination" (264). These objections were sustained and the evidence excluded.

This review shows, we venture to think, that, in the case of Dr. Hart, the sole inquiry is whether the proposed evidence was "incompetent, irrelevant and immaterial", whatever that phrase may mean; and in the case of Mr. Nye whether, assuming that the proposed evidence was not "incompetent, irrelevant and immaterial", it was, bearing in mind the character and scope of his direct examination, "proper cross-examination". No new ground of objection can now be imported into this situation, and the rulings of the learned judge below must, we submit, stand or fall upon the record as made and presented.

So far as concerns the objection "incompetent, irrelevant and immaterial"—the only objection made to Dr. Hart's testimony,—we beg leave to recur to the views of Justice Field and the other Federal Judges already referred to, and also to point out that no specification was attempted to indicate wherein the proposed evidence was incompetent or irrelevant or immaterial; and we submit that an objection in this form is wholly insufficient, and neither preserves nor presents any ques-



tion whatever for review. And that judicial condemnation of this form of objection is quite general, see:

- 1 Wigmore, Evid.*, sec. 18, and cases cited;
- Parsons v. Beling*, 116 Fed. 877;
- Nassau El. Ry. v. Corliss*, 126 id. 355;
- T. & P. Ry. v. Courtourie*, 135 id. 465;
- State v. Goddard*, Ann. Cas. 1916 A, 146, 149;
- T. & P. R. R. v. Courtourie*, 135 Fed. Rep. 465;
- Clark v. Conway*, 23 Miss. 438;
- Steiner v. Trantum*, 98 Ala. 315;
- City of Abilene v. Cornell University*, 118 Fed. 379;
- Leet v. Wilson*, 24 Cal. 398;
- Fowler v. Wallace*, 131 Ind. 347;
- Penn Co. v. Horton*, 132 Ind. 189;
- Kernochen v. El. Ry.*, 128 N. Y. 859;
- Jones v. Angel*, 95 Ind. 376;
- Rush v. French*, 1 Ariz. 99;
- Alcorn v. Ry.*, 108 Mo. 81;
- Voorman v. Voight*, 46 Cal. 397;
- McClusky v. Davis*, 8 Ind. App. 190;
- Lake Erie etc. Ry. v. Parker*, 94 Ind. 91;
- Glenville v. Ry.*, 51 Miss. 629;
- Schlereth v. Mo. Pac. Ry.*, 115 Mo. 87;
- Fox v. Packing Co.*, 70 S. W. (Mo.) 164;
- Randall v. Ry.*, 76 S. W. (Mo.) 493;
- Bannister v. Campbell*, 138 Cal. 455;
- Central Lumber Co. v. Kelter*, 201 Ill. 503;
- Wilson v. Harnett*, 75 P. R. (Colo.) 395;
- Brown v. Shintz*, 203 Ill. 136;

*Hamilton v. Mondota Co.*, 120 Ia. 147;  
*Citizens Mfg. Co. v. Whippie*, 69 N. E. (Ind.) 557;  
*Brier v. Davis*, 96 N. W. (Ia.) 983;  
*Gayle v. Mo. Co.*, 177 Mo. 427;  
*Enrich v. Gilbert Mfg. Co.*, 35 So. (Ala.) 322;  
*Hoodless v. Jernigan*, 35 So. (Fla.) 656;  
*Thuis v. Vincennes*, 73 N. E. (Ind.) 141;  
*In re Inboden*, 86 S. W. (Mo.) 263;  
*Lorgan v. Weltmer*, 180 Mo. 322;  
*George v. St. Joseph*, 71 S. W. 110;  
*Loeser v. Jergenson*, 100 N. W. (Mich.) 450;  
*Lyons v. Grand Rapids*, 121 Wis. 609;  
*Enid Ry. v. Wiley*, 78 P. R. 96.

Even, however, if this objection could be considered, it would still be true that the lower court erred: because, as observed in *Holmes v. Goldsmith*, 147 U. S. 150, 164,

“As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inference it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. The modern tendency, both of legislation and of the decisions of the courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.”

Indeed, in an earlier case, in the same court, the principle was recognized that

“if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.”

*Ins. Co. v. Weide*, 78 U. S. (11 Wall.) 438.

And in this State, also, full recognition is given to the tendency of modern decisions to admit any evidence which may have a tendency to illustrate or throw light on the transaction in controversy, leaving the strength of such tendency to be determined by the jury; and it is also recognized

“Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or nonexistence of a fact.” In civil cases a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them.”

*Moody v. Peirano*, 4 Cal. App. 411, 420: rehearing in Supreme Court denied by latter court January 17, 1907.

In the light of these views, if the dairy conditions in Imperial Valley (some knowledge of which we have acquired in this case) were such that the City of Los Angeles prohibited the consumption of dairy products from that valley, will it be said that this most significant fact does not “tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth” (*Holmes v. Goldsmith*, *supra*)? Does not this Los Angeles prohibition throw light upon the situation in



controversy; and does it not bear directly upon the probability or improbability of insanitary conditions in Imperial Valley? What motive, indeed, other than the preservation of the health of her citizens, would have induced Los Angeles to bar out dairy products from Imperial Valley? And if the conditions, environment and methods of the dairymen there were insanitary, as the defendant company contends they were, then, “according to the common experience of mankind” (*Smith v. U. S.*, 161 U. S. 85, 88), no more significant commentary thereon could well be imagined than this very Los Angeles prohibition.

In every problem involving the admissibility of evidence, two factors are concerned, namely, the proposition to be established, and the material evidencing the proposition: the sole object and purpose of bringing forward the second of these factors is to convince the tribunal of the reality of the first; and the essential, governing principle controlling this subject is that all facts having probative value—“even in a slight degree” or “remotely” (*Holmes v. Goldsmith*, *supra*)—are admissible, unless some specific exclusionary rule forbids. In other words, there is no mystery about the rules of evidence: they do not normally depart from the generally accepted processes of reasoning in ordinary life; and when any unusual or abnormal exclusionary rule is sought to be applied to a pending controversy, the burden of justifying such exclusionary rule must be assumed and sustained by those who would champion the applicability of the rule. Will any one declare, and expect his declaration to be taken seriously, that, accord-

ing to the usual processes of reasoning in ordinary life, the public act of Los Angeles in barring Imperial Valley dairy products because of dairy conditions in the latter place, would not tend, “even in a slight “degree” (*Holmes v. Goldsmith*, *supra*), to convince the tribunal (the jury of men accustomed to the usual modes of reasoning in ordinary life) of the reality of the defendant company’s contention that those dairy conditions were insanitary?

And what gives additional value and probative force to the rejected evidence is the very fact that the exclusion from Los Angeles of Imperial Valley dairy products because of Imperial Valley dairy conditions, was a public act of Los Angeles. This very public nature of the Los Angeles act is in itself a guarantee of the trustworthiness of the evidence: such public acts are the direct product of the exercise of the governmental function of conserving the health of the citizen, and consequently are required by law (Const. Cal., Art. XI, sec. 11): such public acts are of public interest, concern and notoriety; and such public acts are performed under the sanction of official oaths and the obligations of official duty. And every argument which supports the admissibility of public writings, also supports the admissibility of public acts of this character: indeed, Taylor (*Evid.*, sec. 1479) and Greenleaf (*Vol.* 1, sec. 470), define public documents to be “acts of “public functionaries in the executive, legislative and judicial departments of government—including under this general head, the transactions which official persons are required to enter in books or registers in the

course of their public duties, and which occur within the circle of their own personal knowledge and observation''. It may be added that, in an Oregon case, the rule was recognized that common or general reputation may be received concerning a matter in which the public have an interest, or which directly concerns the mass of the people of a town or locality (*Morse v. Whitcomb*, 135 A. S. R. 832).

We submit, therefore, that the mere claim that the proposed evidence was "incompetent, irrelevant and "immaterial", was wholly insufficient to justify the rejection of the evidence: no objection was urged against its technical propriety or its probative quality; and if admitted that it would not have been without effect in the jury room, no one familiar with the customary processes of reasoning would deny.

And when we turn to the testimony of Mr. Nye, additional considerations present themselves. In Dr. Hall's case, the inquiry was presented on his direct examination: in Mr. Nye's case the inquiry was part of the cross-examination of a witness who appeared to advocate, and who attempted to advocate, the superior sanitary condition of Mr. Skinner's premises. But

"the rule that the cross-examination must be limited to the scope of the direct does not mean that the cross-examination shall consist of a mere categorical review of the identical matters testified to by the witness, but merely that new subjects are not to be introduced, and where the direct examination opens a general subject, the cross-examination may go into any phase of that subject. Accordingly the witness may be cross-examined as to matters pertinent to and growing out of or connected with matters elicited on his direct examination, and which



tend to modify, explain, contradict, or rebut his statements on his direct examination, or as to declarations or conduct naturally tending to show the improbability of statements made in the examination in chief”.

40 *Cyc.* 2507 (IV).

And in the State of California, the rule, as to liberality of cross-examination is very broad. The matter is one of statutory regulation; and Section 2048 of the California Code of Civil Procedure provides that a witness may be cross-examined, not only as to any facts stated in his direct examination, but also as to any facts “*connected*” with the facts stated in his direct examination: but no limitation is put upon the “*connection*”—if there be any “*connection*”, whether direct or indirect, proximate or remote, the right of cross-examination extends to the fact so “*connected*”. And the Supreme Court of the State in dealing with this matter of cross-examination recognizes the rule of great liberality. In *Clark v. Clark*, 133 Cal. 667, the court remarked, on page 672, that

“as cross-examination affords the most effective mode of testing the accuracy and credibility of a witness, great liberality should be allowed as to all facts and circumstances *connected* with the matters stated in direct-examination”:

In *People v. Westlake*, 124 Cal. 452, 459, it was pointed out that

“the power of cross-examination is one of the most efficacious tests which is known to the law for the discovery of truth. \* \* \* It is always proper to cross-examine a witness fully as to all facts and circumstances *connected* with the matters stated in his direct examination. This rule in substance has been adopted by this court in many cases”.

In *People v. Dole*, 122 Cal. 486, 491, it was ruled that

“any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness”;

and see, also, among many other cases which might be cited: *Estate of Kasson*, 127 Cal. 496, and *McFadden v. Santa Ana Ry.*, 87 id. 464. In *People v. Gordan*, 103 Cal. 568, 574, the court took the ground that where a witness who has testified to the general character of a person is the subject of cross-examination, he may then be asked, with a view to test the value of his testimony, as to particular facts—having testified as to the defendant’s general good character, his opinion, and the value of it, may be tested by asking the witness on cross-examination whether he has ever heard that the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him; and the doctrine of this case has been approved and followed in *People v. Burke*, 18 Cal. App. 72, 88-9, and *Jung Quey v. U. S.*, 222 Fed. 766, 771. But Mr. Nye took the witness stand to swear to, and he did swear to, the general good character of Mr. Skinner’s dairy so far as its sanitary condition was concerned: why, on cross-examination, should not his opinion, and the value of it, be tested by asking him whether it was not the fact that dairy products from Imperial Valley were barred from consumption in Los Angeles, because of Imperial Valley dairy conditions? What is there in the underlying principle of the thing to inhibit such an inquiry on cross-examination?

In a word, where a general subject-matter, such as the sanitary condition of an Imperial Valley dairy, has

been developed during the examination in chief, the cross-examiner may ask any question relating to that general subject-matter, and is not bound to pursue the line of examination adopted by his adversary; and the general rule requiring testimony to be confined to the point in issue is much more liberally construed during the cross-examination than during the direct. The cross-examiner neither produces nor vouches for the witness; and it is among the commonplaces of the law that, for the purpose of testing the witness, the cross-examiner may develop the relation of the witness to the parties, his relation to and familiarity with the subject of the litigation and that phase thereof as to which he is called, his interest, motives, inclinations and prejudices, his knowledge and means of knowledge, his user of his knowledge, his capacity to observe and his ability to remember and reproduce. The rule limiting inquiry to the general subject-matter of the direct examination should never, we submit, be so construed as to defeat the real object of cross-examination: because one of the objects of cross-examination is to elicit the whole truth about the given subject-matter; and consequently, inquiries intended to fill up designed or accidental omissions, or to call out facts tending to contradict, explain or modify the position taken by the witness on direct, are legitimate cross-examination (*Gilmer v. Highley*, 110 U. S. 47: *People v. Russell*, 46 Cal. 121: *Graham v. Larimer*, 83 id. 173: *People v. Bidleman*, 104 id. 608). Hence, it is not too much to say that, although the *nisi prius* court may exercise a reasonable discretion in regulating the cross-examination, yet it is clearly error to exclude cross-examination that is



responsive to a subject-matter included in the direct examination (*Eames v. Kaiser*, 142 U. S. 488: *People v. Dixon*, 94 Cal. 255: *Storm v. U. S.*, 94 U. S. 76).

**8. The Court Erred in Overruling the objections of the Defendant Company to the Hypothetical Question Addressed on Cross-Examination to Dr. Hart.**

*Assignment 37.*

During the cross-examination of Dr. Hart, a hypothetical question was addressed to him. This question was objected to as "incompetent, irrelevant and immaterial, "and assuming conditions not pertinent and not in "evidence" (203-206): these objections were overruled, and of this ruling, complaint is made by the plaintiff in error (assignment 37). In this connection, it is submitted by the plaintiff in error that this hypothetical question fails to respond to the evidence adduced, presents a distorted and incomplete delineation to the witness, is replete with assumptions of unproved facts, and even as to matters which it attempts to state, can only be described as inaccurate. Some illustrations of these defects may be exhibited.

This alleged hypothetical question commences with a reference to "a healthy herd of some ninety dairy "cows, all of which had been entirely free from the "garget since the herd had been collected" (203). A reference to the testimony of Mr. Skinner will show, however, that this statement is a departure from the state of things indicated by the record. On cross-examination, Mr. Skinner was asked whether he did not state to Mr. Reed that, before he purchased the mechanical

milker at all, he had had some garget among his cows; and he replied that he did not. He was then asked as to his degree of certainty on this subject, and he responded to that with a long explanation as to the meaning of the term garget, from which it appears that it was such an affection as might induce swelling and puffing out of a cow's bag. It further appears that, when an animal is suffering from garget, the milk is not good, but is thick and has blood stains in it. In the course of this explanation, Mr. Skinner admitted, "*I had had cows that had garget, as I understand it, before I used the milking machine*" (150); and after some further pressing upon the subject, Mr. Skinner admitted that he might have stated to Mr. Reed that he had had garget among his animals (151). When, therefore, this hypothetical question undertook to assert that all of the plaintiff's ninety cows had been entirely free from garget since the herd had been collected, it undertook to state something which, according to Skinner's own testimony, was not the fact, and was wholly unsupported by the testimony in the record.

Again, in this hypothetical question, at various places, reference is made to what is called "an expert operator". One assumes that this expression is intended to refer to Mr. Reed: but one looks in vain throughout the record, up to the time this question was propounded to Dr. Hart, for any evidence to establish the proposition of fact that Mr. Reed, although an installer of these machines was, nevertheless, "an expert" operator. Indeed, if we are to accept Mr. Skinner's general story to be true, it must be plain to ordinary apprehension

that Mr. Reed was not much of an expert; and indeed, the contrast between Mr. Reed and Mr. Briggs is emphasized by the testimony of Mr. Skinner as given on page 132 of the record. At that place, Mr. Skinner tells us that Mr. Briggs asked him if he had any preference as to what man should be sent to operate the machine, and Skinner replied by saying, "you will do". Thereupon Briggs remarked that he could not do it, that he was too high-priced a man, and that the company would not leave him there anyhow; and Briggs suggested, "how will Reed do"? There is here, we submit, an obvious distinction suggested between Briggs and Reed: Briggs seemed to be, according to this testimony, a man in a class above Reed: one who was too high-priced to waste his time in operating a machine: one whom the company would not leave in Imperial Valley anyhow; and a man who was not in a position to waste time upon work which Reed might do. So far as Mr. Skinner himself is concerned, he tells us, "I did not consider Mr. Reed in it at all" (136), when speaking about arrangements for paying Reed for the time he should be in Imperial Valley; and we know that after Reed did come to Imperial Valley he was so little of an expert, that he "had Mr. Cram, a veterinarian call in to examine my cows" (152). In view of these references in the record, prior to the asking of this question, and in view of the absence of any direct testimony ascribing to Mr. Reed any superior capacity as an operator of milking machines, we respectfully insist that the assumption in this question that Mr. Reed was an expert operator, is wholly unsupported by the testimony.



This objectionable question then goes on to say that the “expert operator”, after installing the machine, instructed the plaintiff, his son, and hired man in its care and operation, until he pronounced the machine properly installed and adjusted and plaintiff and his milkers “proficient in the operation of the machine”: upon what passage in the record in this case can this defendant in error put his finger to support the statement that Mr. Reed, or any other “expert operator” pronounced the plaintiff and his milkers “proficient in the operation of the machine”? We have been unable, after a careful examination of the record, to find any testimony whatever which supports any such pronouncement by any “expert operator” whatever. On page 118 of the record, Mr. Skinner, speaking of Mr. Reed, states, “he installed the machine and proceeded to run it, “started it and got it to going; and after the machine “was installed and we got everything going, he said “*he thought* the boys could run it all right *with my help and with assistance from the printed literature he had left there with the different instructions he “left”*; and if we stop here, without going any further, the criticism which we should make upon this passage is that so far from pronouncing Skinner and his milkers “proficient” in the operation of the machine, this “expert operator” was himself in that condition of uncertainty upon the subject that he merely “*thought*” that the boys could run it all right, not by themselves at all, but with Skinner’s help and with the further assistance which might be intellectually derived from the printed literature and the different instructions. Mrs. Skinner’s views upon this topic are, however,

somewhat different from those of her husband. She does not pretend to say that Mr. Reed pronounced young Skinner and Harvey Allen “proficient” in the operation of the machine; nor does she dispute the lack of certainty in Mr. Reed’s mind, because she, too, tells us that Mr. Reed “*thought*” that these inexperienced boys were capable of operating the milker (170): but she says nothing whatever about Mr. Skinner’s own help in the matter, nor does she refer either to any printed literature or to any instructions which might have been left,—her entire contribution to this phase of the controversy consists in the statement that “at the time he (Reed) left he said he *thought* they (“our son and Harvey Allen”) were perfectly capable of “running it” (170). Nor is this all: Mr. Skinner himself eliminates his own help in the operation of this machine, and also eliminates the literature to which he refers on page 118, of the record, and somewhat apologetically states, speaking of his son and Harvey Allen, that “*all that they knew about the machine*” was the instructions they received from the book of instructions that the company furnished and from Mr. Reed (145). So that, while on page 118, Mr. Skinner tells us that Mr. Reed “thought the boys could run it all right with my help”, yet, at page 145 he tells us that “all that they knew about the machine were the instructions received from the book and from Mr. Reed”. And this view of the relations between these milkers and this machine receives support from the testimony of Aubrey Skinner, son of the plaintiff. Aubrey Skinner makes more than one statement as to the source from which he received his instructions relative



to this machine: his primary declaration was, "I got "my instructions from my father" (166): in the next breath, he tells us that "Reed instructed us"; and that "at the time he went away he said he *thought* we were "all right". Evidently, the first thought in young Skinner's mind was one which depreciated the Reed instructions: evidently the primary thought in young Skinner's mind was that he had received his instructions, not from Reed at all, but from his father; and we know from Skinner's own testimony, (*passim*) that he was very far, indeed, from being "proficient" in the operation or care of the machine. These references to the record show, we think, the absence of any foundation whatever for the claim that Mr. Reed ever at any time pronounced Skinner or his milkers "proficient" in the operation of the machine: Reed himself nowhere makes any such claim of "proficiency"; and the statement that Mr. Reed did this, is a sheer assumption unsupported by any evidence in the record which we have been able to discover.

Again: it is asserted in this alleged hypothetical question that "the machine was cared for"; but, bearing in mind the general insanitary conditions of the Skinner premises as exhibited even by Skinner himself; bearing in mind that the only water used in connection with the machine, or its parts, was the tainted water of the Colorado river; and bearing in mind Skinner's own confession that as late as October, 1914, "the machine had "gotten dirty" (129), we fail to see upon what evidence this assertion of fact is supposed to rest. One would suppose that the caring for a machine would



include intelligent cleanliness: but what witness in this cause has testified to the application of any intelligent cleanliness to this machine? The farthest in that direction that the evidence carries us is that the teat cups were washed—not sterilized; but the damning fact remains that the water with which they were washed was the same tainted water in which Skinner's cows were permitted to wade and out of which Skinner's cows were permitted to quench their thirst,—the same water that Nye apologized for. (263)

Again: it is asserted in this question that the machine “was cared for and operated in accordance with the “instructions furnished by the defendant company”: but what concrete fact sustains this assertion? Mr. Skinner's testimony, as contained on pages 148-9 of the record, exhibits a conspicuously disoriented perplexity as to the instructions themselves; and Aubrey Skinner (169) explains that “by following instructions, “I mean we did what Reed told us *and I saw in the book there,*”—in other words, the instructions furnished by the defendant company were subjected to the vagaries of construction which might be put upon them by this inexperienced lad of 21 years, and were spelled out by this lad from what he “saw in the book there”. When we consider that among the “Conditions of Sale”, subject to which this machine was sold, there was the special requirement, not to mention others, “that all reasonable precautions tending to the production of “clean milk be observed” (114), and when we recall that Mr. Skinner's anxiety for the observing of all reasonable precautions tending to the production of clean

milk was so keen that even for the purpose of improving the sanitary condition of his milking barn by placing a floor in it "I would not give a man ten dollars to go and "install one" (142), that he "never washed or cleaned "the teat cups between one cow and another at any "time; after I milked the cow, I did not clean the teat "cups before I put them on another cow" (150), that "I did not have a veterinary at my place before I purchased the machine to see my cows" (150), that "if "any veterinary visited my yard during the year 1914, "for the purpose of examining the cows or taking "extracts of milk, I did not know it" (152), that "I "never had any of the milk examined by any of the "veterinaries" (160), that "I never had any veterinary "make any bacteriological analysis of any of the milk" (161), that "all of the water in Imperial Valley comes "from a common source, the Colorado river" (153), that "most of the cows drank out of the ditch—out of "the irrigation ditch. A great many of them walked "right into the ditch, and when they walked into the "ditch the cow's udders and teats would get into the "water" (154), that "when it rained, the cows walked "around in the mud" (155), that "I took my water from "this same common source of water supply" (155), that sick cows were not isolated "but were left in the "corral with the rest of them" (167), and that, as Reed remarks, "I remember making a statement that the "gutters were not fixed right, did not run off right, and "that it was an awful dirty place; and it was a dirty "place" (238),—when we retain vividly in mind these various elements of the situation upon Skinner's premises during the times referred to in the record, how can

we say, as this alleged hypothetical question asserts, that this machine was cared for and operated in accordance with instructions furnished by the company? How can any fair man honestly say that this history, only some of which we have here hastily produced, establishes that “all reasonable precautions tending to “the production of clean milk” (114) were observed?

It is then asserted that after the machine had been used for about thirty days, the cows began developing swollen quarters: but the evidence upon this subject-matter is quite without clarity. At page 120, Mr. Skinner tells us that “up to June 25th, none of the “cows had sustained any permanent injury”, which suggests that, since the machine was installed in February, the condition of the cows, during the month of March, could not have been at all bad. When, however, we turn to the testimony of Aubrey Skinner and his mother, we scarcely know what to think. Aubrey tells us that about a month after he commenced operating the mechanical milker the cows started to come in with, not swollen, but “hard quarters” (166): on cross-examination, however, he speaks of the cows beginning to have swollen quarters for the first time in about a month after they began milking with the milking machine. His mother, on page 171, tells us that about a month or six weeks after the milker was put on the cows, “I noticed the swollen quarters—hard quarters”; and a little further down upon the same page, she gives a new turn to the story by speaking of “hard *and* “swollen quarters”. From all this, coming as it did from the plaintiff’s own side of this case, it is indeed,



extremely difficult to determine just what the fact was; and we think that in view of these declarations of these witnesses, it would have been much more fair to have exhibited the fact just as it was described in the testimony, rather than to reject one characterization, and arbitrarily adopt the other.

Then came another statement of fact entirely unsupported by the evidence—a plain assumption of a fact which there was no evidence whatever to support. It will be remembered that the answer in the cause set up as a special defense the insanitary conditions prevailing upon the Skinner premises, and that the testimony of Skinner himself, carefully read and equally carefully analysed, shows the substantial truth of this special defense; and some of the discoveries developed in this behalf have been attempted to be collected in the general statement of the case which we have heretofore made. From the beginning of the trial until the moment when this objectionable hypothetical question was presented to Dr. Hart, no declaration fell from the lips of Mr. Skinner or his wife or son, or from any other witness in the cause, declaring in plain terms that the Skinner dairy was clean: on the contrary, all of the testimony pointed the other way. From the beginning of the trial up to the moment when this hypothetical question was asked from Dr. Hart, neither Mr. Skinner, nor his wife, nor his son, nor any other witness, testified that during June, 1914, upon the arrival of either Mr. Reed or Mr. Briggs upon the plaintiff's ranch, either of them thoroughly disinfected the machine, and thoroughly disinfected the premises: nowhere can a scrap of evidence

be found to justify or support this bald assumption. And in view of the state of the pleadings, and the condition of the evidence, this assumption of unproved fact was most material and important. Moreover, the claim of Mr. Skinner, and his witnesses, upon the whole case, was that the Skinner premises were in good sanitary condition: but what makes this assumption of unproved fact all the more reprehensible is the obvious suggestion that if the theory of Mr. Skinner and his other witnesses upon the whole case be sound, in other words, if the Skinner premises were in good sanitary condition, then, plainly no necessity whatever would exist for this asserted disinfecting of the machine and premises. Notwithstanding all this, however, this, like other unsupported assertions, not only suggested a distorted picture to the witness, but also, unfortunately, suggested to the learned court below no reason why this hypothetical question should not be asked. And the seriousness of this gratuitous assumption is manifested by another consideration, viz, that if the premises were disinfected, injury to the cows of the infectious character claimed by the defendant company could hardly, it would be argued both in court and jury room, be attributed to premises which had just been disinfected, but must be attributed to some other instrumentality; and since the Skinner claim reiterated in this hypothetical question itself was that he "had a healthy herd of some ninety " dairy cows, all of which had been entirely free from " garget since the herd had been collected" (203), and since no infection could arise from the recently disinfected premises, the obvious conclusion would be disastrous to the only other instrumentality left, viz: the



mechanical milker. In view of all of these considerations, we earnestly urge that permitting this hypothetical question, under these circumstances, to be asked and answered, was plainly and unmistakably reversible error.

Another assumption contained in this hypothetical question against which we protest as being unsupported by the evidence, is the claim of aggravated and intense swellings appearing in the cows after June, 1914. The facts are that, as Mr. Skinner tells us on page 120, up to practically the end of June, no permanent injury had been done to the cows: we know that the milker was not in operation from July 7th, to October 20th (122, 172); and "after October, seven of the cows were hurt " and some of them injured" (130), or, as Mrs. Skinner puts it, "Reed operated it (the machine) from October " 7th until just after Christmas; and while the machine " was being operated, something like seven or eight " cows, I think, of swollen quarters developed; during " that time no new cases of swollen quarters developed " among the two strings that were being milked by " him" (173). If these statements of these witnesses correctly represent the fact, one fails to see any foundation for the claim of aggravated and intense swelling. Mr. Skinner, indeed, draws a distinction between cows that were "hurt" and cows that were "injured": just what this distinction means, Mr. Skinner does not vouchsafe to explain; but whatever the explanation may or may not be, he presents no claim of aggravated or intense swellings.

This last criticism suggests a brief reference to another statement in this hypothetical question which



we do not conceive to be sustained by the evidence, viz, that the cows operated upon between July and December, 1914, were cows "which had not theretofore shown any "udder trouble" (205): but we know that Skinner's cattle had theretofore been afflicted with udder trouble: we know from his own lips, "I had had cows that had "garget, as I understand it, before I used the milking "machine" (150): we know that "between June 25th "and July 7th, we had fourteen cows in the hospital "as we called it, and then there were more that were "not so bad and were left in the corral with the rest of "them" (167); and in view of these statements, we are unable to understand the basis for the statement made in this question. In this same connection, the hypothetical question claims that "during this two months " (October 20th to December 20, 1914), between eight "and twelve of the cows being milked by the milker "developed swollen quarters": but here, again, we are unable to find evidence to sustain the assertion. The very utmost that can be claimed upon this record is that 7 or 8 only of the cows developed swollen quarters; and we fail to appreciate the fairness of increasing, without proof to sustain it, the number of animals claimed to have been afflicted. At page 167, for example, Aubrey Skinner tells us that "there were seven or "eight that had *hard* quarters—I would not be positive"; on page 173, Mrs. Skinner speaks of "something like 7 or 8 cows, I think, of swollen quarters "developed"; and when we turn to the testimony of Mr. Skinner himself, we find that "after October, 7 of "the cows were hurt and some of them injured",—but beyond this vague statement, one hears nothing to

support the claim made in the hypothetical question. And before leaving this particular branch of the hypothetical question, we wish to protest against the statement therein contained that “of the 60 odd remaining “ cows of the herd being milked during the same period “ by hand, developed no new cases of swollen quarters”: but here, again, we find a conflict between the statements of the hypothetical question, and the statements in the record. This particular assertion of the hypothetical question is specially bad in that it speaks of the remaining cows that were milked during the same period by hand developing no new cases of swollen quarters: but the testimony of Mrs. Skinner makes it plain, we think, that instead of the 60 odd cows being milked by hand, they were milked by Reed operating the machine,—the hypothetical question omitting to show that the mechanical milker was used upon these very 60 odd cows. Mrs. Skinner’s testimony was this: “Reed “ operated it from October until just after Christmas; “ and while the machine was being operated something “ like 7 or 8 cows, I think, of swollen quarters developed; “ during that time no new cases of swollen quarters developed among the two strings that were being milked “ by him” (173); and we submit that this testimony shows plainly when considered not only in itself, but also in the light of the other evidence in the record, that the 60 odd cows referred to in the hypothetical question as having been milked by hand, were not in fact milked by hand, but were milked by the mechanical milker.

Another objection to this hypothetical question as assuming conditions not in evidence, is suggested by the statement that Mr. Skinner’s herd had no swollen



quarters either before or after the user of the machine: but Skinner himself, in plain terms, actually admitted on page 150 that before he used the milking machine at all, he had had cows that had garget—a disease of which swelling is the most prominent symptom. Aubrey Skinner does not say that prior to the advent of the mechanical milker the cows had not suffered from swollen quarters: he confines himself to the very cautious and non-committal negative statement that “prior to the time the milker was put on, I *had not seen* “a swollen quarter *in the cows I had milked*” (168). And upon this topic, Mrs. Skinner contributes nothing.

And finally, not unduly to expand criticism of this hypothetical question, the statement is made, for the purpose of emphasizing the asserted culpability of the mechanical milker, that there was a “rapid” disappearance of swelling when the cows were taken off the machine. The evidence, we think, shows the contrary of this, and in our opinion wholly unauthorizes this claim of rapidity. The testimony of Mr. Skinner, on page 120 of the record, fails to exhibit any “rapid” disappearance of cow trouble, when the cow was removed from the machine: on page 121, he tells us that Reed ran the machine for about two weeks in June-July, 1914, that the cows developed swelling, and that instead of any rapid disappearance of any swelling, “the bags were ruined”: on page 122 he repeats instructions to his hired man, which are entirely inconsistent with the thought of any “rapid” disappearance of swelling: on page 159, in describing the outward (incorrectly printed upward) symptoms of the animals, he



exhibits a condition which no one, we think, would rightly feel to justify a claim of rapid disappearance; and on page 171, Mrs. Skinner speaks of the cows being "ruined". Instead of there being this "rapid" disappearance of swelling when the cows were taken off the machine, it appears from Skinner's story that "before the time when Briggs came, there were 20 cows "ruined" (124): and again, on page 130, he recurs to the thought that "the injured cows were absolutely "ruined for dairy purposes"; and on page 151 he tells us that "there were the 20 cows that were injured in June and July, that had caked bags and showed evidence of pus in the bag". His whole effort was, *inter alia*, to show that when one of these cows would become diseased, "she never would give the same milk any more" (162-3), a statement repeated by his son (166, 168). Putting together all of the testimony upon this subject to be found in the record, some of which we have here referred to, we submit that the statement contained in this hypothetical question as to this alleged "rapid disappearance of swelling" when the cows were taken off the machine, is unsupported by the evidence. The plain object of this statement is, of course, to attribute the swelling directly to the machine: that is the only theory upon which the foregoing numerous departures from the record can be explained: but we submit that no rule of law will justify a hypothetical question which assumes a state of facts which the evidence fails to support.

Nor is this all: this alleged hypothetical question sins not only by excess, but also by defect: it is incomplete

and it omits very material features of the cause which should properly have been brought to the attention of the witness (*Balt. etc. Ry v. Dever*, 112 Md. 296, 313). We do not propose to do more than merely suggest some few of these features, such, for example, as the silence of this question with reference to the intervention of the fourth unit, the bacteria-tainted water, the accumulations of manure, the unchanged pressure and vacuum during the use of the machine, the failure to isolate affected cows, the actual disclosures of the evidence as to the treatment of teat cups, the water or mud holes which the animals were permitted to use, the absence of veterinarian assistance, the condition which compelled Reed to describe the place as “dirty”, and the general disregard of “reasonable precautions tending to the production of clean milk” (114),—a requirement called for by the very “Conditions of Sale”, subject to which the mechanical milker was sold. We do not wish to weary the court by going at length into the absence of material features necessary to a truthful picture of the situation: nor do we attempt to dissect all of the many *unsupported* statements which are contained in this hypothetical question: but we do submit, with great earnestness, taking this hypothetical question as a whole, and dissecting it in the light of the case as made by the evidence, it was clearly reversible error to overrule the defendant company’s objections and permit the question to be answered.

The rules which regulate the presentation of hypothetical questions are so well understood that an extended reference to them will not be necessary. If

there is one rule which is thoroughly well established it is that the question must be based upon facts that the evidence directly, fairly and reasonably tends to establish: for, as the Supreme Court of Nebraska inquired in a case wherein the trial court compelled a hypothetical question to conform to the facts admitted or proved,

“how can an expert give an intelligent opinion upon that point, or one that the jury would be justified in acting upon, unless the inquiry reflects the proof on that question? There must be a fair statement of the case to render the answer of any value whatever, as a partial statement or one founded on mere fiction would not fail to mislead the jury and probably cause a miscarriage of justice. The court did not err, therefore, in its ruling”.

*Burgo v. State*, 42 N. W. (Neb.) 701, 702.

In a frequently cited Michigan case, it was observed that

“no more important duty is devolved upon trial courts in these cases than to see that these questions are permitted upon the proper basis, and to instruct the jury as to the consideration and weight they should give them”.

*Prentis v. Bates*, 50 N. W. (Mich.) 637, 644.

And, as was observed by the Supreme Court of Wisconsin,

“Surely, there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness upon whose testimony such hypothetical question is based, when a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter”.

*Vosburg v. Putney*, 50 N. W. (Wis.) 403, 404.



And, finally, not to be too tedious with State cases, in reversing a judgment for error in permitting a defective hypothetical question, the Supreme Court of Minnesota remarked:

“All hypothetical questions must be based upon facts admitted or established, or which, if controverted, might legitimately be found by the jury by the evidence. Such a question should embody substantially all the facts relating to the subject upon which the opinion of the witness is asked, since the opinion of the witness is worthless, and may be misleading, if given on a state of facts that does not exist, or upon an incomplete statement of the facts bearing upon the subject upon which the opinion of the witness is asked.”

And then, after referring to the evidence in the case, the opinion proceeds:

“The question propounded was based upon an incomplete hypothetical statement of facts. It was also based in part upon a hypothetical fact which was neither admitted nor sustained by any evidence in the cause, to wit: that the defendant knew that the plaintiff had sustained a dislocation of the cervical vertebrae. On the contrary, the evidence is conclusive that the defendant did not know that plaintiff had received any such an injury.”

*Wittenberg v. Onsgard*, 81 N. W. (Minn.) 14, 15-16.

The view of the law for which we contend finds support in *Raub v. Carpenter*. There, a hypothetical question was asked the witness which was based in part upon undisclosed facts, and assumed the existence of facts for which there was no foundation in the evidence. The lower court sustained an objection to the question, and when the exception came before the Supreme Court, Chief Justice Fuller, in delivering the opinion of the court, said:

“Clearly the opinion of the witness from facts he did not disclose was inadmissible. If he knew anything about the deceased other than what he had stated, which aided him in arriving at a conclusion, that knowledge should have been developed. *In that particular the question assumed the existence of facts for which there was no foundation in the evidence.*”

*Raub v. Carpenter*, 187 U. S. 159, 161.

And so, likewise, in the more recent case of *Harten v. Loffler*, the same principle was applied, the court, speaking through Mr. Justice Peckham, remarking:

“The exclusion of the evidence of the witness Montague, when called by the defendant with reference to the value of the property, was not error, *because there was absolutely no evidence whatever to support the hypothesis stated in the question.* The question assumed as a fact that the business amounted to \$150 or \$200 a week, and that the realty was worth only \$4,000 with the improvements, the land and buildings on it, and then the question was put, ‘What would be a fair price to pay for that land with the improvements and fixtures, and the liquor license and good will of the business, but not including any of the stock in trade?’ The question assumed the value of the greater portion of the property sold.”

*Harten v. Loffler*, 212 U. S. 397, 405.

And so, also, in the recent case of *Union Pacific Railway v. McMican*, the Circuit Court of Appeals for the Eighth Circuit, recognized the rule that

“when a hypothetical question is submitted in such a case, it should only embrace facts which have been given in evidence. Such a rule was clearly violated in this case, and for that reason a new trial must be granted. The fact that the witness, when interrogated by the court, stated that in his opinion the question fully covered and represented statements made in evidence and the history of the case as stated to him by plaintiff, did not remove the vice. *It was for the court primarily, and the jury finally, to*

determine whether the question embraced a proper statement of the facts as shown by the evidence, and not for the witness to base his opinion upon partly undisclosed statements. Objections were made to other hypothetical questions to other doctors on the ground that they included facts which were not embraced in the evidence which had been given” \* \* \* “There was nothing in the testimony that indicated that within 24 hours after the accident the abdomen was in a badly swollen condition. Hypothetical questions should not embrace facts not in evidence. While counsel may base a hypothetical question upon his theory of the correctness of conflicting evidence, it is error to embrace facts which are not disclosed by the evidence”.

*Union Pacific Ry. v. McMican*, 194 Fed. 393-395-6.

And in the case of *Western Assurance Company v. J. H. Mohlman Co.*, 83 Fed. 811, 822, the Circuit Court of Appeals, for the Second Circuit, speaking through Judge Lacombe, stated:

“The only remaining exceptions are to the refusal of the trial judge to allow defendant’s witnesses Cashman and Freel to express an opinion as to ‘how long a fire would burn in the building before the posts would be weakened’, and as to ‘what time would elapse before fire and smoke would appear’. The hypothetical question intended to elicit this information contained, so far as the record shows, no indication as to whereabouts in the building the fire broke out. It is manifest that this is an important—probably the most important—element in the hypothesis, and, without it, any opinion, expert or other, would be mere wild guesswork. The trial judge correctly excluded it.”

And finally, in holding it to be reversible error to admit the answers of expert witnesses to hypothetical questions which assumed the existence of facts of which no evidence is offered, the Circuit Court of



Appeals for the Seventh Circuit, in *North American Accident Association v. Woodson*, 64 Fed. 689, observed, at page 695, that

“This being the kind of case the plaintiff must make out,—that Dr. Kemper had had a fall which had produced extravasation of the blood in the brain,—the importance of the facts detailing the symptoms contained in the hypothetical questions becomes obvious. It is a proposition too simple to require any citation of authorities that the material facts assumed in a hypothetical question must be proven on the trial, or rather that there must be evidence on the trial tending to prove them. Otherwise, it is error to allow them to be answered *How can we say that either the answers to the questions or the verdict of the jury would have been the same if the statements contained in the questions, and not proved, had been omitted?* Evidence of experts who are allowed to give an opinion is always attended with a sufficient degree of uncertainty and danger when founded upon an assumed state of facts which appear on the trial, or which the evidence tends to prove, and which the jury must find proven. If counsel can, in advance of knowing what he will be able to prove on the trial, frame his questions as he pleases, putting into them supposititious statements from his own invention and ingenuity, wholly unsupported by evidence, then the danger of this rather unreliable kind of testimony will be increased a hundred fold;” citing many State authorities.

On the whole, then, reading this hypothetical question in the light of the actual disclosures of the record in this cause, and in the light of the principles of law governing inquiries of this character, we respectfully submit that it was reversible error to overrule the objection of the defendant company to this hypothetical question.

9. **The Lower Court Erred in Permitting the Plaintiff Below to Testify in General Terms to His Opinion or Conclusion as to the Amount of his Alleged Loss or Damage in the Quantity or Amount of Milk or Butter Fat, Instead of submitting to the Jury the Data Upon Which He Claimed a Loss, Leaving it to the Jury to Determine Whether There Really was a Loss, and if so, How Great that Loss Was.**

*Assignments 13, 23, 24.*

In this behalf, the record exhibits the following state of affairs:

“Q. Did you suffer any loss as the result of the  
“operation of this milker upon your herd in the  
“quantity or amount of milk or butter fat you received  
“from that herd?

“Mr. PARKE. We object to the question as calling  
“for the conclusion of the witness.

“The COURT. Objection overruled.

“Mr. PARKE. Note an exception. And said defend-  
“ant, said Sharples Separator Company, a corpora-  
“tion, now assigns said ruling as error.

“Exception Number 8.

“The WITNESS. I did. The other cows this milker  
“was used on that were not injured went off on their  
“milk; the only way I have of getting how much less  
“milk they gave is in my cream sheets. These cows  
“were injured during the last days of June and the  
“first days of July; in June and July my cream check  
“dropped \$142.13; it never did go back up again. If  
“they had not used this milker the cows would, in  
“my opinion, have held up. The milk that I lost by  
“reason of this amounts, I think, to \$1500—the  
“value of it.

“Said defendant, said Sharples Separator Company,  
 “ a corporation, thereupon moved to strike out all of  
 “ the testimony of the witness on the value of the milk,  
 “ as stating a mere conclusion; said motion was then  
 “ and there denied by said court, to which said ruling  
 “ defendant Sharples Separator Company, a corpora-  
 “ tion, then and there duly excepted, and now assigns  
 “ said ruling as error.”

The rule is, of course, elementary that witnesses must state facts, but not conclusions, opinions or conjectures (*Winslow v. Glendale Light and Power Co.*, 164 Cal. 688; *Callahan v. Marshall*, 163 id. 553; *Ferguson v. Hubbell*, 97 N. Y. 507; and cases herein cited elsewhere upon this topic); and the same view is taken in the Federal courts (see some applications of the principle in: *Fort Pitt Gas Co. v. Evansville Contract Co.*, 123 Fed. 63; *Ball v. U. S.*, 147 Fed. 32-37; *Detroit So. Ry. v. Lambert*, 150 Fed. 555). And this general rule is applied to the issue as to damages claimed on account of a loss. Every litigant is entitled, we submit, to have the reasoning of the jury rather than that of the witness, applied to the facts of his case, and a witness cannot invade the province of the jury by giving his opinion or conclusion as to the amount of damage asserted to have arisen from the series of facts upon which the cause of action sued on is sought to be based. Consequently, a witness is not permitted to give his opinion as to the loss or damage which a party claims to have sustained, because when he does so he includes the law as well as the fact. It is the duty of the jury to assess damages according to the rule of law which



it is the province of the court to lay down for their guidance; and witnesses are permitted only to furnish the data from which the amount is arrived at. This rule is thoroughly well established; and the following are some of the cases which sustain it:

- Patterson v. McMinn*, 152 S. W. (Tex.) 223;  
*International Agricultural Cor. v. Abercrombie*,  
 49 L. R. A., N. S. 415;  
*Kraus v. Coffin Co.*, 123 Ga. 817;  
*Springfield, etc. Co. v. Warrick*, 249, Ill. 470;  
*Huntington v. Stemen*, 37 Ind. App. 553;  
*Cinn. etc. Co. v. Brandenburg*, 142 Ky. 814;  
*Carter v. Md. etc. Co.*, 112 Md. 599;  
*Wiggins v. St. Louis Ry.*, 119 Mo. App. 492;  
*Odell v. Storey*, 81 Neb. 437;  
*Raymond v. Edelbrock*, 15 N. D. 231;  
*Montgomery v. Summers*, 50 Ore. 259;  
*Byrne v. Cambria Co.*, 219 Pa. 217;  
*Kirk v. Seattle Co.*, 31 L. R. A., N. S. 991;  
*Church v. Wilkerson*, 137 A. S. R. 1059;  
*De Wald v. Ingle*, 96 id. 927;  
*Harriman v. New Nonpareil Co.*, 122 Iowa 616;  
*St. Louis Co. v. Law*, 68 Ark. 218;  
*McKinnon v. Palen*, 62 Minn. 188;  
*Atchinson, etc. Ry. v. Wilkenson*, 55 Kan. 83;  
*Cochman v. Bowmaster*, 73 App. Dec. N. Y. 310;  
*Van Dusen v. Young*, 29 N. Y. 9;  
*Atlantic Ry. v. Campbell*, 64 Amer. Dec. 607;  
*Green v. Plank*, 48 N. Y. 669;  
*Whitmore v. Bowman*, 4 G. Green 148;  
*Montelius v. Atherton*, 6 Colo. 224;

*Hurt v. St. Louis Ry.*, 4 Amer. St. Rep. 374;  
*Wakeman v. W. & W. Mfg. Co.*, 54 Amer.  
 Rep. 676;  
*Huston Ry. v. Burke*, 40 id. 808;  
*Freemont Ry. v. Marley*, 13 Amer. St. Rep. 482.

When Mr. Skinner undertook to put his milk and/or butter fat loss at \$1500 he was making the wildest kind of a guess: he had no means by which to render "clearly ascertainable" (Cal. Civil Code, sec. 3301) his loss or damage in that regard: he was quite without data from which or by which to determine with any degree of certainty whatever just what his alleged loss or damage was; and these circumstances emphasize the impropriety of permitting him to make a flying guess at the amount. At page 136, he admits in plain terms that "I did not make or keep any record " of the amount of milk obtained from each individual " cow"; and in his bill of particulars, filed in this cause, he concedes that "no record was kept of the " amount of milk each cow gave" (291-2). And so, likewise, with the butter fat: at page 292, he admits that he "has not in his possession at the present time " a record of butter fat given for the preceding year" which would be 1914; and he then proceeds to set forth what purports to be the number of pounds of butter fat for each month during the year 1914, together with the price per pound for each month, except January and February (292-3): but no reliance can be placed upon the figures last referred to for the reason that, on page 138, Mr. Skinner is constrained to admit that "the amount of butter fact that I received each

“ of the months of 1914, as set out in this bill of particulars, and the price at which I sold butter fat those months, is not correct for all the months”. Mr. Skinner omits, however, to explain what is meant by the phrase “all the months”: whether this expression includes the twelve months of the year or any less number, is nowhere made clear; nor is any attempt whatever made to show what month or months, if any, are correctly referred to in the bill of particulars. In other words, Mr. Skinner had no real data illustrative of the loss or damage claimed, and in his statement to the jury, he presented, in opposition to the settled rule of law, a mere conclusion or opinion concerning the loss or damage involved; and since he kept no account of the milk, and since he concedes his butter fat account to be incorrect, it must be obvious, we think, that his mere guess should have been excluded by the learned judge of the court below. As far back as the time of Lord Mansfield (*Carter v. Boehm*, 3 Burr. 1905, 1908), that learned judge said that:

“It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and the jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness;”

and the view for which we are contending is recognized by the Supreme Court of the United States in *Dushane v. Benedict*, 120 U. S. 647, in the following language:

“The court may properly decline to permit one of the plaintiffs to testify in general terms what he estimates the amount of their damages to be, where he has not testified to the items of damage, or to any facts upon which his opinion was based.”



In *Ellwood Planing Co. v. Harting*, 52 N. E. (Ind.) 621, it was pointed out that

“a question is not proper which, in effect, calls upon witnesses to estimate the amount of the damage which should be assessed by the jury, because of the act or omission for which damages are claimed in the action”:

in *Richardson v. City*, 13 Amer. St. Reports, 482, the court declared that

“it is not permissible for a witness to state the amount of damage sustained. He should state the facts within his knowledge and from those facts and other evidence adduced it is for the jury to determine the amount of damage”:

in *Western Union Tel. Co. v. Ring*, 62 Atl. (Md.) 801, it was held that it was improper to permit a witness, against the objection of the defendant, to give in exact figures his estimate or judgment of the damage: in *Ohio, etc. Co. v. Nickless*, 71 Ind. 271, it was declared that the evidence of the plaintiff as to the amount of damage sustained by him was clearly incompetent: in *Springfield, etc. Co. v. Warrick*, *supra*, it was pointed out that

“it is the duty of the jury or of the Court to assess damages on data furnished by witnesses from which the amount of damages should be arrived at”:

in *American Pure Food Co. v. Elliott*, 31 L. R. A., N. S. 910, it was held to be erroneous to permit a party to assess his own damage, and the court observed that

“the party injured cannot be permitted simply to ‘guess at it’ ”,—

precisely what Skinner attempted to do in the cause at bar:

in *Cross v. Coffin Company*, *Supra*, it was held that

“it was not permissible for the witness to state merely in general terms the amount of the damage sustained. He should have given the jury some facts and data from which to estimate the amount of damage. The testimony was nothing more than a conclusion of the witness as to what damage had been sustained. \* \* \* It was the province of the jury to fix the damage from proved facts, and they were not to be controlled by mere conclusion of witnesses as to this matter”:

in *Pac. Live Stock Co. v. Murray*, 76 Pac. 1079, the court pointed out that a witness cannot express an opinion as to the amount of damage sustained, because that is exclusively within the province of the jury, under the instructions of the court; and in *Raymond v. Edelbrock*, supra, it was held that the opinion of the plaintiff as to his damage was clearly incompetent.

We submit, therefore, that in this particular, and it was a most important one, the lower court grievously erred in admitting this incompetent evidence; and since it is wholly impossible to say that the jury was not influenced thereby, it follows, we submit, that a reversal should be ordered.

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#### INSTRUCTIONS TO JURY.

**The Charge to the Jury of the Learned Judge in the Cause at Bar Was Confusing, Misleading, Contradictory and Inharmonious: It Wrongfully Assumed the Existence of Controverted Facts; And It Omitted Elements Without Which It Was Impossible for the Jury to Arrive at a Just Determination Concerning the Rights of the Parties Litigant.**

We regret the necessity which compels us to criticise the charge given by the learned judge below to the

jury, but we are nevertheless constrained to urge upon this court the proposition that this charge was a most important factor in the development of a verdict which we regard as unjust. In an analysis of this charge, we find the learned judge assuming as proved the very facts that were controverted; we find directions that are confusing, misleading, contradictory and inharmonious; we find undue prominence given to the plaintiff's side of the case; and we find pertinent requests by the defendant denied a place in the charge as given. These general characteristics of the charge are of themselves, as it seems to us, sufficient to condemn it.

The learned judge commences his charge by assuming as established the most vital fact in the case. He tells the jury that "this is an action brought by plaintiff to recover damages for *injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows*" (296), thus assuming that losses and injuries were actually suffered by the plaintiff as a result of the operation of the mechanical milker. The defendant company has never admitted that any injuries and losses were suffered by the plaintiff as a result of the operation of the mechanical milker; and upon the issue as to whether any such injuries and losses had actually been suffered by the plaintiff, the defendant company was entitled to take the opinion of the jury, and to take that opinion unbiased by any assumption by the court.



It is elementary that to weigh the evidence and find the facts is the province of the jury: it is for the jury to determine what the evidence shows, because otherwise there would be no excuse for their existence; and consequently no rule of law will justify a court in an invasion of the legitimate province of the constitutional triers of the facts, whether that invasion take the shape of a determination of controverted matters of fact or otherwise. That the plaintiff below did actually suffer injuries and losses as a result of the operation of the mechanical milker, might have been argued to the jury by the plaintiff's counsel, and in that event the defendant company's counsel could have answered upon, at least, equal terms—counsel against counsel: but the weight of the opinion of the court had no place in either scale; and therefore when the learned judge threw the weight of his opinion against the defendant company at the very pivotal point of the contest, by assuming the very injuries and losses which the defendant company controverted, he invaded the province and usurped the function of the jury, and committed grievous error. As observed in a California case,

“The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of the decision of an issue from themselves to the court.”

*People v. Williams*, 17 Cal. 147-8;

and as pointed out by the Supreme Court of Alabama,

“it is of the highest importance in the administration of justice that the court should never invade the province of the jury; should give them no intimation as to his opinion upon the facts, but should leave them wholly unbiased by any such intimation to ascertain the facts for themselves. We cannot shut our eyes to the fact that juries, especially in cases which are strongly litigated upon the facts, watch with anxiety to gather from the court some intimation as to what the judge thinks should be their finding upon the facts.”

*Hair v. Little*, 28 Ala. 236.

And an apt illustration of the vice of assuming controverted facts in a charge to a jury, will be found in *People v. Lee Chuck*, 74 Cal. 30. In that case the lower court undertook to assume in its charge that the deceased was shot and killed by the defendant: but the record in the case failed to show any such admission on the part of the defense, and no such admission was involved in the theory of the defense; and the court held that because the assumption was not justified by the facts, and because it was in itself favorable to the theory of the prosecution, reversible error was committed.

The learned judge then proceeds to state the issue between the parties, which is done with the accent upon the plaintiff's recovery: the jury are told that if they find the plaintiff's allegations to be true, it will be their duty to find a verdict for the plaintiff; but no alternative is stated, nor is any hint given the jury as to the conditions under which they might find a verdict for the defendant company,—indeed as the charge reads, it seems to take it for granted that plaintiff should and would have the verdict, and that

the possibility of a verdict for the defendant company might well be ignored. Nor, in this connection, is a word said about the burden of proof as one would expect; nor was anything said upon that subject until the court was well along in the charge,—until, indeed, the court was approaching the end of the charge; and while the court told the jury that the burden was upon the plaintiff, yet the assumption was even here indulged that there was an injury to the cows (300-301)—an injury which, throughout the bulk of the charge, is associated by the learned judge with the operation of the mechanical milker.

The primary thought in the mind of the learned judge, the thought to which he gave prominence by formulating it at almost the commencement of the charge, by referring to it at intervals throughout the charge, and by recurring to it near the close of the charge, was the damages which the jury was to allow the plaintiff: but it is significant that nowhere throughout this charge is there the remotest reference to the “Conditions of Sale” which were part of the Exhibit 1 referred to in the charge, and subject to which the machine was sold. It will be remembered that throughout the record the “instructions” are dealt with and spoken of as something distinct from the “Conditions of Sale”: the “Conditions of Sale” were an actual constituent part of the contract of sale (112-114), but the “instructions” were contained, not in the contract of sale, but in printed books, a copy whereof was delivered to Mr. Skinner, but which copy Mr. Skinner rather cavalierly permitted to evaporate (148-9); and



while at certain places in this charge the learned judge refers to the "instructions", he nowhere refers to the "Conditions of Sale", or attempts to accord to them that "special attention" (113) which the contract itself calls for. Bearing these things in mind, what was the primary instruction to the jury upon that subject matter of damages which so quickly attracted judicial attention? It was this, that if the jury found that the cows were injured by the operation of the milker, they should allow plaintiff damages in a sum which would be fair (not something less than full or complete; just) compensation for loss incurred by an effort in good faith to use the machine for milking plaintiff's cows. But, passing for the present the proposition that this is not the true measure of damages in cases of this class, and passing for the present the confusion and misleading contradiction between this direction and later directions upon the same subject, why was it that no reference was here made to the mode of operation of the milker? The whole theory of the sale, the plain letter of the contract of sale, called for compliance with the "instructions" and for "special attention" to the "Conditions of Sale"; why were these important factors ignored, condemned as naught by silence, and the jury left free to say that "the operation of the milker", regardless of the conformity of that operation to "instructions" or "Conditions of Sale", was quite enough to authorize damages, if those "injuries and losses" were suffered which the court at the outset of the charge assumed were suffered? We think that if an instruction is to be given to a jury, it should

include the various elements which are relevant to the subject-matter of the instruction; and we believe that the giving of undue prominence to one feature, to the utter disregard of other features equally important, is productive of great injury to a litigant. What, indeed, was the jury to think when it saw such important features ignored as the good mechanical order of the machine, the proper adjustment of pressure and vacuum, the careful and thorough stripping of the cows after each milking, the thorough cleansing of the machine after each milking, and the observance of all reasonable precautions tending to the production of clean milk? What was the jury to think when it was told that the right to damages turned upon the fact that the cows were “injured by the operation of said milker”? The defendant company made no warranty of non-injury at all hazards or under all circumstances: they sold the machine subject to “special attention” being paid to the “Conditions of Sale”; and to tell the jury that damages accrued if the cows were “injured by the operation of said milker”—an injury already assumed by the court itself—is not only to sweep out of the case the defendant company’s special defense and all the evidence supporting it, but to inject into the minds of the jury a new contract upon which the minds of the parties had never met.

But this is not all. Could anything be more confusing, misleading or inharmonious than the position taken by the learned judge upon the subject-matter of the alleged warranty? His view upon this subject

will be found at the bottom of page 297 and the top of page 298; and we believe that it will be found, from an inspection of these two paragraphs, that the learned judge invaded the province of the jury by assuming the existence of the alleged warranty. In the amended complaint, the pleader seeks to allege a warranty: in the answer of the defendant company, denial of any warranty is made; and thus was framed the issue of warranty *vel non*. Why, then, did the learned judge assume the existence of this controverted fact? We are wholly unable to recall any admission whatever, at any time during the trial, made by the defendant company as to this alleged warranty, which would have authorized the learned judge to treat the existence of the asserted warranty as an uncontroverted fact: whether the plaintiff had established sufficient facts and circumstances to cause the reason of the jury to find the existence of the alleged warranty, was fair matter of argument for the counsel of the respective contending parties; but we earnestly submit that the learned judge forsook his judicial position when he assumed to impress upon the jury his private judgment upon this controverted fact, for the reason, if for no other, that the jurors—or some of them—and the judge may have held widely different views concerning the matter.

But mark, moreover, the misleading confusion of the first of these paragraphs. The learned judge refers to the printed documents which plaintiff “says were “delivered to him by the Sharples Separator Company during the negotiations leading up to the sale



“to him of the Sharples mechanical milker”; and then instructs the jury that “These contained various statements regarding the Sharples mechanical milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed” (297-8). But, not only does this instruction assume the controverted fact of warranty, not only does it assume the existence of some undefined and unidentified “warranty”, but what “warranty” is meant? How was that jury to identify the “warranty” referred to? The “printed documents” were not attached to the contract of sale: they were not in any way connected therewith: there was no proof that these “printed documents” were the “printed matter” mentioned in the contract: to assume that they were would be the wildest of guess-work: there was no proof whatever that, although Hickson “opened” (111) the negotiations, yet he was really a sales agent of the company, or participated in the actual making of the actual contract, or was authorized to bind the company whether by printed matter or otherwise: how was that jury to determine what “warranty” the learned judge had in mind? The learned judge nowhere defines the term “warranty”, or attempts to clear up for the jury its limitations: nowhere does he designate any particular statement in these “printed documents” as being a warranty; and since, as we have already shown, these “printed documents” themselves, so far from being warranties, are merely expectations, hopes as to the future, and dealer’s talk, what success could that jury have while groping about

among them in the vain search for a “warranty”? Is it possible that anything could well have been more confusing or misleading than this?

But the difficulty does not cease here. After having directed the attention of the jury to these “printed documents”, after having treated these documents as containing some nebulous warranty, and after having told the jury to “decide from all the evidence whether “the warranty has been performed”, the learned judge then, in the next breath, tells the jury that the “*only*” warranty to be considered by them is that contained in Plaintiff’s Exhibit 1. What, then, does this mean? No “printed documents” are set forth in, or identified by, Plaintiff’s Exhibit 1: is therefore the “*only*” warranty this, that defects of workmanship and materials are guaranteed against, the machine is in all respects as represented, and it is “*capable*” of doing the work as claimed? Has any intelligent claim been made of any defect of workmanship or materials? And as to the machine, who is there that puts his finger upon any feature of it that is not as represented? And who pretends to say that it is not “*capable*” of doing the work as claimed? If the “*only*” warranty to be considered is “the warranty *contained in* the original “order”, why refer to “printed documents” that are *not* “*contained in*” that original order? And how was that jury to determine by what rule they were to ascertain the rights of the contending parties?

The learned judge then proceeded to quote to the jury two sections of the California Civil Code, but,

unfortunately, did so in such a manner as to leave the jury in added doubt and uncertainty as to the rule which should govern their deliberations; and this condition of things arose from the failure of the learned judge to give the jury even a remote hint as to “the time to which the warranty referred”. Even where there is really a warranty, there must be some ascertained point of time when liability under it should cease: normally, a warranty refers to the time of the sale, and, in cases of this impression, is breached then, if breached at all; but why should the learned judge have directed the attention of the jury to “the time to which the warranty referred”, but have wholly failed to tell them what that time was? Surely, nothing could well have been more confusing than to leave the jury to its own unaided devices upon such a material matter as this; and of this, plaintiff in error, who was entitled to a clear, systematic, and unconfused statement of the law, has an undoubted right to complain.

The learned judge then told the jury that if they found that there was a warranty that the mechanical milker sold plaintiff “would milk his cows without injury”, and that the warranty was broken, they should allow plaintiff damages for all injuries proximately resulting from the operation of the milker, while the milker was being operated in conformity with the instructions of the defendant company. But the defendant company never gave to the plaintiff any warranty that the milker “would milk his cows without injury”; as the learned judge had told the jury, “the only warranty given \* \* \* is the warranty contained in the



“original order”: but that “warranty” merely goes to defects of workmanship or materials, to the presently existing condition of the machine, and to its *capability* of doing the work as claimed in certain unidentified “printed matter”; and even if we import into the situation the printed matter from which at the trial counsel made the selection of the paragraphs printed in the record, still that printed matter fairly read and taken as a whole is nothing more than a general dealer’s recommendation dependent in its turn upon the proper care for and user of the machine and due compliance with the “conditions of sale” under which the sale was made. And assuming any warranty at all, it was not by any means a naked warranty that the milker would milk the cows without injury: on the contrary, the sale of the machine was made subject to compliance with the book of printed instructions that Skinner tells us about, and with the conditions of sale which call “special attention” to certain specific points. In a word, if there was a warranty, it was not the bald warranty, without more, that the milker “would milk his cows without injury”; and to put the case to the jury as if this were the length and breadth of the warranty, was to invite them to ignore the conditions under which the sale was made, and to disregard the grossly insanitary dairy conditions that obtained upon the Skinner premises. Such a course could not fail to work injustice to the defendant company.

In the next place, we earnestly urge that the learned judge erred in defining to the jury the measure of damages, and that his instructions in that regard were

inconsistent and contradictory. At page 298, in a manner that we have already criticized, the learned judge referred to Sections 3313 and 3314 of the California Civil Code dealing with the detriment caused by a breach of warranty; and according to these two sections, that detriment includes the excess, if any, of the value which the property would have had at the time to which the warranty referred, if complied with, over its actual value at that time, plus fair compensation for the loss incurred by an effort in good faith to use the property for the particular purpose for which it was warranted to be fit. But no other elements were included within this detriment; it would not, for example, include prospective profits (*English v. Spokane Com. Co.*, 57 Fed. 451), nor would it include any other element of damages than those designated in the statute. But when we turn to page 301, we find the door thrown open to the admission of every sort or class of damage shown to have been the proximate result of injuries caused by the machine, no matter how numerous, no matter of what character. The learned judge said: "If you believe from all the evidence that plaintiff's cows were injured by the use of the milking machine furnished by the defendant while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant upon the plaintiff's cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine". Plainly, under this broad invitation, the jury could have

awarded damages for loss of profits, say, or for a variety of elements not recognized by the quoted sections of the Civil Code. Could anything have been more contradictory than this? In one breath, the jury are told in substance that the damage is limited to the designated excess of value plus the designated compensation for loss incurred in endeavoring to use the property for the particular purpose: in the next breath, the jury are told that they may allow for any sort of damage shown to have been the proximate result of injuries caused by the machine: but it was, we submit, wholly impossible for the jury to decide which of these contradictory instructions should prevail; and it is wholly impossible, we submit, for this court to say on which of them the jury acted. The rule, we think, is thoroughly settled that where instructions on a material point are contradictory the judgment will be reversed, and that even where they are contradictory in the sense only that they are confusing, the verdict cannot stand. And from this it follows that if the trial court gives to the jury two instructions, one correctly stating the law, but the other incorrectly stating it, the judgment will be reversed. The philosophy of this rule is manifested in the following, among other, cases:

*Armour & Company v. Russell*, 144 Fed. 614;

*McCreery v. Everding*, 44 Cal. 251;

*Chidester v. Ditch Company*, 53 id. 58;

*Bank v. Bliven*, 53 id. 708;

*Black v. Sprague*, 54 id. 266;

*Aguirre v. Alexander*, 58 id. 21;

*Sappenfield v. R. R.*, 91 id. 59.



But this is not all: we are unable to conceive how, under the instructions of the learned judge, the jury could have arrived at the result formulated in the verdict. Under the law of California, every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages (C. C. 3281): this detriment is a loss or harm suffered in person or property (*id.* 3282): but this detriment must, in cases involving the breach of an obligation arising from contract, be proximately, not remotely, caused by the breach, or be such as, in the ordinary course of things, would be likely, not doubtfully, to result therefrom (*id.* 3300). It is moreover a settled rule that one person's money is not to be guessed into the pocket of another under the guise of damages: damages must be certain: "no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin" (C. C. 3301). Plainly, then, there is no right to damages where no detriment or loss has been clearly shown with certainty: the loss must be, not only the natural, but also the proximate, consequence of the wrong (*Smith v. Bolles*, 132 U. S. 135); and therefore vague, indefinite, remote consequential or uncertain results are not embraced in the compensation given by damages,—and this for the reason, if for no other, that it cannot certainly be known, it cannot be "clearly ascertainable" (C. C. 3301) that they are attributable to the wrong, or whether they are not rather connected with other causes. It may, indeed, be added that,

under the California statute, Mr. Skinner would not, in a proper case, be entitled to recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides (C. C. 3358): but there is no proof here that a full performance of this contract upon both sides would, under the disclosures of this record as to Mr. Skinner's dairy and its environment, have obviated disease among his cattle, or have diminished his receipts; and any mere opinions of Mr. Skinner or any one else concerning these matters would be too uncertain and conjectural to form a basis for the estimation of damages,—the generalities of friendly witnesses (like the Imperial Valley fellow-residents) being too unsafe to be made the basis of a judicial award (*The Conqueror*, 166 U. S. 134).

Bearing these principles in mind, let us look for a moment at the five rules given the jury to govern them in allowing damages (301-2). How, we venture to ask, can these five rules be of any avail when we find an element common to each of them which is essentially vague, indefinite, uncertain, and not “clearly ascertainable”? And how, then, can any result reached by the application of these rules be treated as immune from the vice which infects the rules themselves? In each of these rules, the loss of butter fat is an essential ingredient: but in this case is there any factor more vague, indefinite, uncertain and not “clearly ascertainable” than this of the loss of butter fat? Mr. Skinner professes no certainty as to any loss of butter fat: the best that he attempts in that direction is a guess: at

page 292, he admits he has no record of butter fat for 1914: at pages 136 and 291-2, he admits that "no record" was kept of the amount of milk each cow gave"; and at page 138, he admits that the butter fat record for 1914, as set out in the bill of particulars (292-3), is not correct for all the months, but omits to say for what months, if for any, it is correct: upon what basis, then, was this jury to arrive at the loss of butter fat? No other witness throws any light upon this element: where were the jury to procure any certainty as to it? If we had been dealing with the Shore Acres Dairy, this element of damages could have been certainly shown, and would have been "clearly ascertainable" if that dairy had been the plaintiff: its superintendent, as a progressive man, found no difficulty in keeping a record of each particular cow, what they were producing "regularly" (215): he could have told from his figures what any cow was doing at any day: no valid reason anywhere appears to explain why Mr. Skinner could not have done this also, and thus have rendered his alleged damage "clearly ascertainable"; and if his claim be true that the injuries to his cows were attributable to the mechanical milker rather than to the unprogressive and unsanitary condition upon his dairy, he had a sufficient motive, all through the year 1914, to have kept some sort of a certain record that a court or jury might safely rely upon.

And observe the consequences of this: At pages 124-5, Mr. Skinner puts his loss in cattle at \$2025; and if we pass this item and add to it the cost of the milker (\$461.42: p. 140), we obtain \$2486.42: how, then,



did the jury reach the figure of \$3763.92 (96)—an excess of nearly thirteen hundred dollars? Not by including loss of butter fat, because that was too uncertain and was not “clearly ascertainable”. Not by including the gasoline engine, staunchions and cement floor, because the court told them to eliminate these items (299-300). Not by including the reasonable value to the plaintiff of the milking machine, because the court told them to excise that (299-300). Not by including the expense of pasturage, because we understand the court to have disallowed that (302 *ad finem*); and even if it were allowed, the foregoing figures would be increased by \$420 only, which would make the total \$2906.42, thus leaving an excess of \$857.50 unaccounted for upon any rational basis. How, then, except by guess-work, did the jury reach the figure that they did? And if their attention had been directed to the necessity for some tangible and certain basis for figuring damage, would they have adopted these inexplicable figures?

Moreover. Not only did the learned judge err in the charge as actually given, but he erred also in refusing to give certain instructions requested by the defendant company. In this regard, attention may be called to the defendant company’s proposed instructions numbered VII, IX, XIV and XV, which instructions, we submit, should have been given to the jury, and for which, no proper substitutes in our opinion can be found in the charge of the judge as given. These instructions were framed by the defendant company in accord with its theory of the case, as it had an undoubted right to do;

and we think it obvious from an inspection of the learned judge's charge that no real equivalent for the directions contained in these proposed instructions was presented for the consideration of the jury. Indeed, we cannot help but feel that taking the charge as a whole, it indicated a significant leaning in the direction of the plaintiff's side of this controversy: accent seems to us to have been put upon the plaintiff's right to recover damages: his injury and damage are generally maximized, while the views of the defendant company are generally minimized; and to such an extent was this developed that from the beginning to the end of the charge no reference was made to the conditions of sale under which the milker was sold, prominent among which was the taking of such sanitary precautions as would insure the production of clean milk. We think, in a word, that the charge taken as a whole was unduly favorable to the plaintiff and unduly unfavorable to the defendant company. We think that the contentions presented by both sides of a controversy should be accorded balanced treatment: that the charge to a jury should not select one side of a case for prominence, while at the same time depreciating the other side by silence or underestimation; and we submit that a failure to accord equal prominence to both sides of a controversy,—whether that failure be concreted in the singling out of one witness, or one class of witnesses, or one side of a case, for special prominence, thus distorting or undervaluing the other side of the controversy,—has not infrequently been the subject of judicial condemnation by respectable courts (*Thomas v. Gates*, 106 Cal. 1; *People v. Arlington*, 131 id. 231; *People v. Lonnen*,

139 id. 637; *Morgan v. State*, 48 Ohio St. 371; *Shank v. State*, 25 Ind. 207; *State v. McNeil*, 193 N. C. 552; *People v. Lyons*, 49 Mich. 78); and Judge Seymour D. Thompson, in his monograph on "Charging the Jury", after referring to the practice of summing up the evidence to the jury, as that practice has been in vogue in England, in the Federal courts, and in the courts of some of the States, goes on to say:

"It is, therefore, a golden rule, that the judge, who undertakes to present the evidence to the jury, must array before them all the material evidence on either side. He must not single out isolated parts of the testimony, and instruct the jury as to the law arising on the facts which such testimony tends to prove, and he must be careful not to give undue prominence to certain portions of it: especially he ought not to review only those facts which have a tendency to establish one side of the case. 'To sum up means, *ex vi termini*, to present all the proof to the consideration of the jury; and unless this is done, it had better be omitted altogether'. It is obviously wrong for him to single out an isolated fact, and express himself strongly upon it. It is well calculated to distort its importance in the estimation of the jury, and to concentrate their attention too intensely upon it, to the undervaluing of the rest of the evidence."

*Thompson, Charging the Jury*, sec. 80, page 111.

With very great respect for the learned judge who tried this case below, we submit that such a procedure as that condemned by Judge Thompson fills the mind of the jury, ever eager to "catch at intimations of the court" (*People v. Williams*, 17 Cal. 147), with disparagement, distrust and discredit of that side of the controversy which has been "damned with faint praise"; and hence it comes about that one side of the controversy is thus subjected to an unjust discount from



which the other side is quite free. We, therefore, submit that a charge to a jury which fails to give equivalent prominence to both sides of the controversy violates the principle that the law contemplates, and a fair trial requires, that the jury shall enter upon the consideration of the controversy with unbiased and inquiring, but not with biased or prejudiced, minds.

Upon the whole case, it is very earnestly submitted that in the interests of justice to this plaintiff in error, this improvident judgment should be reversed, and the cause remanded for a new trial which will be free from the errors which assisted so conspicuously in producing the verdict complained of.

Dated, San Francisco,

January 2, 1918.

Respectfully submitted,

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No. 2978

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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THE SHARPLES SEPARATOR COMPANY

(a corporation),

*Plaintiff in Error,*

VS.

W. W. SKINNER,

*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

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FILED

MAR 4 - 1918





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## BRIEF FOR DEFENDANT IN ERROR.

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Learned counsel for plaintiff in error have been industrious in combing the testimony for statements favorable to their client and have displayed dexterity and ingenuity in arranging the same in a light which shows off their side to the best possible advantage. This can always be done with seeming success in any case where the evidence has been conflicting, and we respectfully submit that this is all there is to the points made under the head of the insufficiency of the evidence.

We will not therefore undertake to follow counsel's general statement of the case in which they review the evidence from their own point of view,

but will proceed to answer the specific points which they endeavor to make.

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## I.

**ANSWERING THE CONTENTION THAT THE EVIDENCE SHOWS THAT THE DAMAGE TO SKINNER'S COWS WAS CAUSED BY AN UNSANITARY CONDITION AND NOT BY THE MECHANICAL MILKER, WE SUBMIT AS FOLLOWS:**

The defendant having expressly pleaded, as an affirmative defense, the unsanitary condition of Skinner's Dairy, it was to be expected that defendant's witnesses would establish the existence of such condition, if it were possible to be done. Yet only two of defendant's witnesses, Reed and Taylor, touched on this point. Albert J. Reed was employed by the Sharples Separator Company as their mechanical milker expert. His deposition was taken on behalf of that company, but by some inexplainable error it appears in the transcript as having been taken on behalf of "plaintiff." The mere reading of the deposition—the questions asked on direct examination and the questions asked on cross examination, as well as the various objections made—should be sufficient to convince anyone that the deposition was not taken for plaintiff. The transcript moreover shows (239) that the cross examination was conducted by "Mr. Swing," who is attorney of record for the plaintiff, Mr. Skinner. It is therefore to be expected that defendant's attorney conducted the direct examination,



and the fact is that Mr. Willard P. Smith, one of the attorneys of record for the defendant, The Sharples Separator Company, did conduct the direct examination. With this reminder, we do not anticipate that counsel for the other side will persist in seeking an advantage based upon a mistake or repeat the insinuation contained in their brief that this “deposition was taken for Mr. Skinner, *but with great discrimination not offered by him upon the trial.*” (brief p. 10).

Mr. Reed, who as expert for the defendant company, installed the milker in the Skinner Dairy and instructed them in its use and who himself made several different attempts to operate it, describes the dairy as follows:

“There was a dairy shed. It had a thatched roof, two rows of stanchions, two rows of mangers, two concrete platforms for the cows to stand on, and one concrete gutter on the south side; the gutter on the north side was without a concrete bottom; there was a wooden floor through the center. He had a milk house and power house combined, about 50 feet south of this dairy shed. The milking machines and the dairy shed connected up to the power house and operated from the power house. There was a water hole located between the power house and dairy shed; it is similar to all water holes in Imperial Valley for washing up dairy utensils;—the dairy shed was kept in as good cleanliness as it was possible to keep; it was clean all but the gutter on the north side, and that, having no bottom, was more or less dirty. It could be cleaned out, but not as clean as it should be. Later on I made suggestions to Mr. Skinner by which he could remedy the trou-

ble; I put in two board planks, 2x12, and filled in the bottom" (Tr. pp. 234, 235).

Dr. Walter J. Taylor, defendant's other witness who referred to the sanitary condition of the Skinner ranch in his testimony, said that he "noted that they were on a par with the majority of dairies in the Imperial Valley" (179).

The foregoing certainly does not constitute a very formidable indictment of the Skinner Dairy nor does it support defendant's allegations that the dairy was unsanitary.

Mindful of the admonition given by opposing counsel that plaintiff would "not be human if he did not represent conditions in the light most favorable to himself" (brief p. 143). We will leave it to others to describe the actual conditions surrounding his dairy.

Mr. C. F. Boarts, who had handled milch cows practically all his life and who was at the Skinner ranch the latter part of February, very shortly after the installation of the mechanical milker and who looked around the Skinner place and noted the conditions (259), testified:

"He had a very good dairy house; his dairy barn had a cement floor all the way through; I believe there was one side that had a gutter that was not finished. He had his pools fenced at that time and the general condition as to cleanliness in the barn was good. There was no loose manure in the gutters and the cleanliness of the place struck me as being very good. The water supply was not out to this pool,

but was close by, and the water looked good in the pool” (259).

H. D. Nye was State Dairy Inspector for Imperial County from August 28, 1914, until June 1, 1916, and as such, inspected dairies as to their sanitary condition. He visited the Skinner Dairy about five times between September 1, 1914, and the end of that year. He testified:

“The sanitary condition of that dairy was good. I never found a mud hole in that dairy—I mean in the corrals or around the buildings. The barn was clean; the milk house was in good shape; the water holes where the cows drank, the settling basins, as we call them, were fenced, and planked, so the cows could drink out of them without getting into them, and the water was as clear as we have ever been able to get water in Imperial Valley. I have never seen any stock or foreign matter in the ponds of any description. The utensils, both the milking machine and other utensils I saw there, were always clean and sweet smelling. The cows once in a while would be a little muddy around the lower part of the legs, but aside from that, were in very good condition” (263).

H. Rogers, another witness, had been State Dairy Inspector and County Health Officer for four years preceding the appointment of Mr. Nye. He had visited the Skinner Dairy as often as two or three times a week. He confirmed the testimony of Mr. Nye to the effect that the sanitary conditions on the Skinner Dairy were good (265).

It is not likely that two State officials would give the Skinner Dairy a good character unless the conditions warranted it.



However, if there were conditions existing at the Skinner dairy at the time and after the installation of the milking machine which interfered with the successful operation of the milker, it was the duty of the defendant company and its experts to so advise the plaintiff. Their expert installed the milker and he and other representatives of the defendant company were frequently at the dairy thereafter, but nowhere in the record is there any evidence that any of them suggested any change in the conditions which existed after the milker was installed except in the single instance where Reed suggested planking the north gutter (165). This suggestion was promptly carried into effect.

On this point Skinner testified:

“At the time Mr. Reed installed my machine and instructed me in the operation of it, he did not suggest any changes to be made in the sanitary conditions which surrounded my dairy. We installed the machine before I got the barn really finished and we did not get one of the gutters as good as it should be and after using it for a while the cows began to break it and Mr. Reed said, ‘Mr. Skinner, if you will just take 2x12s it will fill the gutter and we can clean it out.’ He did not suggest any other changes in the conditions there. I operated the machine under the same conditions under which he operated it. He did not wash the teat cups in any different water from what I washed them—I mean water from any different source. I simply followed out what he showed me” (164, 165).

Hard pressed for some explanation of the condition of Skinner’s cows the defendant grasps at

first one theory then another in the vain hope, no doubt, that while each if examined by itself would be found insufficient, yet taken all together they may present a seeming strength, which no one of them possesses in fact.

Great stress is laid upon the water supply at the Skinner Dairy. A Dr. Taylor found "yellow micrococcus" in some water test he made in Imperial Valley. However no tests were made of water on the Skinner Dairy (180). Taylor also found yellow micrococcus in the milk drawn from Skinner's sick cows. From this it is argued that since all water came from the Colorado River and yellow micrococcus were found in some of the water: there must have been yellow micrococcus on the water on the Skinner Dairy; that since yellow micrococcus were found in the cow's milk it must have gotten there when the cows went to drink or was transmitted through the teat cups by their having been washed in the water; that since the cows examined and which were found to have yellow micrococcus in their milk were sick, therefore their sickness was caused by the presence of the yellow micrococcus. Tests were made with milk only from cows suffering from udder trouble (177 and 178). Non constat, but that yellow micrococcus might have been found in the milk of the healthy cows, too. (Dr. Ward of the University of California seems to have published an article in which he states that he had examined sixteen healthy udders

and had found this yellow micrococcus present in every case, 221. Same effect see Dr. Hart, 201.)

Dr. Taylor found the same micrococcus in the water from the El Centro Hotel tap, the Date Canal and the filtered water from the Duniway Drug Store (181); in other words in the very water all the inhabitants of the city of El Centro were drinking. There is no particular significance in this discovery because these germs are generally found everywhere; they are ubiquitous, omnipresent (Kelly 216, Hart 200). There is not in the evidence any suggestion of there having been any general epidemic of infectious mammitis either among the people or live stock who drank this water. It was only at Skinner's Dairy and there *only on the cows that were milked with defendant's milker* (130). Even if there were yellow micrococcus in Skinner's water (for which there is no evidence), they never got to the cows from washing the milking utensils in the water because the water used for this purpose was boiled water (Reed 239, Skinner 157). This was an extra precaution that Skinner voluntarily took. The company's instructions nowhere required the water to be boiled or the teat cup to be scalded (Hart 207). It only required that they be put in a solution of lime. Skinner did that too (149).

Another theory advanced by the company is that the injuries resulted from "improper use or mismanagement" of the milker (brief 182), most of the milking having been done by Allen and Skin-



ner's son characterized on page 20 of the company's brief as "inexperienced boys." These same "boys" are referred to on page 4 of the company's brief as a "young man named Allen who was about the same age as Mr. Skinner's son—22 or 23 years old." But aside from the competency of Skinner's milkers what about the failure of Reed, the company's own expert, to make the machine work from January 25 to July 7, and from October 20 to December 20, when he had absolute control? The company vouches for Reed's qualifications as an operator, yet he was unsuccessful.

Mr. Reed, who was the company's milking machine expert, and whose duty it was not only to install machines but also to "instruct the purchasers of the same in their proper use" (Frank, 253), did instruct Skinner's milkers in the use of the machine (145); he stayed until he was satisfied they could operate it (118); he stayed two weeks and at the time he left declared they were "perfectly capable of running it" (170). Counsel for the other side attack plaintiff for keeping pressure at 7 and vacuum at 17 while milking, yet it is undisputed that this was the emphatic instruction of the company (147-148). Defendant's own witness says so (Van Denenden 226). The pulsator was to be used in making the change from an easy milker to a hard milker, not the pressure or vacuum (226). This was done according to instructions (169) Skinner says "I followed the instructions carefully, every word; I studied it like a school book" (148).

Reed came back three times afterwards to check up their work but instructed no changes in the way they were operating the milker (166); in fact he said "they were operating the machine all right" (170).

So on close scrutiny falls each of defendant's theories as fall they must because the real cause of the injury was the milking machine. There had been no trouble of this kind before the mechanical milker was used on the cows (122, 168). No cows were affected at the time the milker was installed (Reed 236). Reed said "Skinner, you have the cleanest herd I ever put a machine on" (151). Then the cows began developing the swollen quarters—"hard" quarters (171). However as soon as they quit milking the cows with the machine and began milking by hand the swelling reduced and the cows began to get better (164-171). In fact they would return to normal except they wouldn't give as much milk as before (166, 168). But when the milker was put back on them the swelling would reappear (167). During the period from July to October, 1914, when the machine was not being used on the cows, no new cases of swollen quarters developed (172). After the milker was restarted by Reed October 15, 1914, on one string of 30 cows (Reed 249) several new cases of swollen quarters developed in that string (Reed 250). While during the same time no new cases developed among the other two strings being milked by hand (Mrs. Skinner 173). And finally after the use of the machine

was abandoned in December, 1914, no further trouble of that kind developed (135-168).

There can be no rational explanation of the swollen quarters other than that the operation of the machine either bruised or irritated the teats or that the suction drew the blood down into the teats causing congestion and inflammation, which in turn caused the swollen hard quarters.

If it was germs in the manure in the corral which the cows picked up when they lay down in it, then some of the cows would have picked up some of the germs prior to the time of the installation of the milker, but there was no trouble of that kind in the herd until after the introduction of the milker. If Skinner's cows were picking up contagious or infectious germs in the "dirty" corral between February and July, 1914, when some twenty cows on whom the milking machine was working developed swollen quarters and again six or seven more on whom the milker was being used between October 20 and December 20, 1914, what were the same infectious or contagious germs doing between July 1 and October 15, when the milker was not being used and no new cases of swollen quarters developed. It will not be contended that the germs were hibernating. Again during the two months from October 20 to December 20, 1914, when the machine was used on only one string of cows (129, 167, 249) and the remaining two strings were being milked by hand, the only cases of swollen quarters to appear developed among the thirty



being milked by the machine (173). It will not be contended that these germs had a sense of discrimination and picked out and attacked only the cows on which defendant's milker was being used.

If it were the germs in the mud holes in which defendant says the cows had to wade to drink, all the cows waded there—those milked by hand as well as those milked by the machine—they also waded before the machine was installed, when no new cases developed—again we ask why the difference?

Or if it was due to the water in which the utensils were washed, the milkers who milked by hand washed their hands in the same water and defendant's witnesses say the germs can be transmitted by hand as easily as by the teat cup (Kelly 218, Dr. Hart 202). What is the explanation that only the cows milked by the milker developed swollen teats?

If they attempt to say the injuries were due to the improper use of the machine what can they say of the results attained by their own expert? Reed was at the Skinner Dairy from June 25 to July 7. Regarding the occasion for his being there, he says: "Skinner had stopped his machine and I was sent for to restart it" (245). "I was sent by the Sharples Separator Company." The machine was operated under Reed's direction (Reed 246). Reed took charge of the machine and ran it for two weeks (Skinner 121). No one attempted to exercise supervision over him; he took charge; he put the machine on all the cows and ran it

about two weeks (Mrs. Skinner 171). During these two weeks Reed injured—ruined for dairy purposes, some twenty cows (124). Reed himself admits the injurious effect of the milker on the cows after he started the machine and states he had to keep taking cows off the machine on account of their condition (248). He described the condition to be:

“The whole udder was swollen, there was high fever—individual cows were in very bad condition.” He was asked then: “How soon did this condition appear after you had started the milker upon them?” To which he made the short but significant reply: “Directly” (249). Prior to Reed taking charge on June 25 none of the cows had sustained permanent injury (120). Of those injured by Reed, Mrs. Skinner said, “seventeen did not give any milk at all—they were too bad” (171). “Three of the cows actually died” (124).

But if the foregoing test be not admitted as conclusive, it remained for the company itself to furnish the final evidence which absolutely completes the case against it.

One day in October, 1914, F. L. Briggs, a high priced employee of the Sharples Separator Company (132) called at the dairy and importuned Skinner to consent to a further testing of the machine on Skinner’s cows (122 and 123). When Reed left July 7 the milking machine stopped and it was not again used by Skinner (122, 128, 167). He had enough of its workings. He was convinced,

but not so the company. It wanted to start the machine again. Skinner absolutely refused to expose his cows to further injury from the machine. But Briggs would not take "no" for an answer. He came back again (123) and over the bitter protest of Mrs. Skinner (172) and finally only after Briggs had given Skinner a written agreement, the machine was restarted.

This October test was made under conditions most favorable to the success of the company's machine. They selected their own expert operator to run the machine. Skinner told Briggs at the time the agreement was made "you can send anybody you want. It is up to your people, the Sharples Separator Company" (132). Briggs wanted Reed (132). Reed says he was at the Skinner place October 20 to December 20, and took charge of the mechanical milker (246). "I was working at that time for the Sharples Separator Company" (247). Skinner told Briggs and Reed "to pick the herd and get just such cows as they wanted"; "I had nothing to do with selecting the cows," says Skinner (129). "They selected a string of good cows. They were mostly young cows that had not been used on the milking machine before" (Mrs. Skinner 173). "They selected cows that had not been injured" (129). "*They picked cows they thought the machine would milk*" (129). Briggs and Reed then cleaned up the machine, it having been in disuse from July 7 to October 20 (122). "They took the things out and boiled them and put



in new rubbers" (129). "Briggs helped Reed to sterilize everything and get it milking" (173). "Briggs stayed there after the first milking and I think he came back a time or two after that" (Aubrey Skinner 167). These two representatives of the defendant were given full authority to make their test in their own way under conditions of their own choosing. If the company's own experts failed under these most favorable circumstances, what defense is possible? Mr. Skinner said: "Mr. Reed had absolute control" (129-130). Mr. Reed did all the using; he did everything to it; I never touched it and none of my men—I gave my men strict instructions not to touch the machine under any conditions" (128-129). Mr. Reed himself says: "I took charge of the mechanical milker" (246). "I operated the milker" (246).

Now what were the results obtained. Swollen quarters began appearing within the first two weeks of the operation of the milker (Reed 249-250). Out of the thirty cows Reed was milking (249) more than seven were injured, some absolutely ruined for dairy purposes (Skinner 130-Aubrey Skinner 167). And finally Reed, himself, was compelled to admit that he could not operate the machine without injuring Skinner's cows (133-134, 173), and advised his company to abandon the attempt (134).

The history of the operation of this milker shows conclusively that the direct and proximate result of its use was the swollen quarters. Reed admits

he observed this result “directly” after he started the milker upon the cows (249). Mrs. Skinner noticed a change in the cows after the milker was put on them—saw swollen quarters develop (171). Skinner says:

“Throughout the year 1914, at least one-half of my herd were affected—at least fifty from the use of the machine” (144).

How weak and impotent the company’s answer when called to account for this injury and destruction of property: *Skinner was unable to point out “specifically or particularly any defect in the milker”*.

How can the company in good faith make this contention when they had their own expert there for that very purpose and he didn’t know (158). What obligation was Skinner under to find and point out specifically and particularly any defect in the milker. The company manufactured it; they put it on the market; they warranted it would do certain work; it failed; is not that enough? Skinner did not pose as an inventor. He did not undertake to perfect their machine. They represented it to be perfect. If it was not, it was their business to discover the “specific and particular” defect and remedy the same.

And in fact this is what it seems the company was really attempting to do. Experimenting with their machine on Skinner’s cows and *at Skinner’s expense*. The company’s experts were trying out

their machine on Skinner's cows and the company's subsequent and present attitude has been and is that they had everything to gain and nothing to lose by such a course. Skinner was to be left without recourse for his losses.

In view of the foregoing facts, is it any wonder that Dr. Taylor, defendant's expert witness, whose qualifications cover a page of the transcript (176), after examining the udders of Skinner's sick cows by "manual" manipulation to determine the presence of congestion or other pathological condition (177) and after making a microscopic examination of samples of the milk from the cows (178), and after making "cultures on Agar plates," and also "sub-cultures upon slant Agar medium," and after transferring colonies "on Agar slant mediums in test tubes by the streak method of inoculation" declared to defendant's attorney that Skinner's cows "were not suffering from infectious mammitis" (187), and further that it was his opinion "*that the condition started from an external injury*" (189). And this is the identical conclusion reached by the only other veterinarian who saw Skinner's cows and who testified in the case, except that Dr. Cram dropped the camouflage and came out with the clean-cut statement:

"I decided that the primary cause of the condition of the cows I saw there was due to the *milking machine*" (275)

If, still additional evidence were required it is in record.



We quote Dr. Ridder, Deputy County Veterinarian for Imperial County. He said:

“I have come in contact with quite a number of the Sharples Separator Mechanical Milkers in various parts of my community—probably 8 or 10. They were not successful on account of the irritation—the constant suction producing irritation on the udder; it hurts the cow’s teats; it sets up an inflammation—mammitis” (267).

C. F. Boarts said:

“In my opinion the Sharples Separator machine was not a successful machine; the machines under my observation have failed to milk the cows without injury” (260).

A. G. McCulloch, who had used a Sharples milker and had seen others in operation, testified: “the effect I noticed on cows following the use of the Sharples mechanical milker was udder trouble” (283). It was his opinion that the milker could not be used without injuring the cows (284). To all this must be added the depositions of J. H. Eastman, J. W. Finley, H. C. King, J. J. Miller and H. O. Woods, that they had used the milker according to company instructions and had been unable to operate it without injuring their cows (290).

In view of the foregoing we feel warranted in saying not only that there is some evidence to support the verdict (which is sufficient where the evidence is conflicting), but that the preponderance of the evidence is overwhelmingly in favor of the

plaintiff's contention that the milking machine was the cause of the injury to his cows.

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## II.

### ANSWERING THE CONTENTION THAT THE AMOUNT OF DAMAGES ALLOWED WAS NOT JUSTIFIED BY THE EVIDENCE.

No point is made that the evidence does not support the item of \$2005 for injury to the cows, and the item \$420 for pasture.

The first item of damages which defendant attacks is \$1007 for purchase and installation of the mechanical milker. Now, if the company's warranty was broken (and we claim the evidence demonstrates this fact), plaintiff was entitled under the law of California to the excess of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value, plus a fair compensation for the loss incurred in an effort in good faith to use it for the purpose for which it was warranted (Calif. Civil Code, 3313 and 3314). Skinner's uncontradicted testimony on this point is:

"The reasonable value of this milking machine is the condition in which it was found to be by me after I bought it, is that it was worth nothing; if it had been the way it was represented by the company it would have been worth \$1000" (129).

This \$1000 of course, represents the milking machine installed with the necessary equipment and capable of milking the cows without injury as the

company warranted. This testimony supports the allegations of the complaint and there is no evidence contradicting it; in fact all the evidence on this point tends to confirm it.

The first part of this item, to wit: \$461.42 cash paid defendant company for the machine itself, stands conceded as proven. Nor is it denied that plaintiff, in his effort in good faith to install and use the machine for milking his cows, actually paid out the further sums of \$175 for an engine to operate the milker and \$370 for lumber, cement, lime and nails to build stanchions and put in a concrete floor necessary for the installation and operation of the milking machine. Defendant contends, that, notwithstanding this money was expended wholly and solely for the purpose of being able to operate the milker, still, inasmuch as plaintiff still has them and no allowance whatever should be made in the judgment for their cost. First as to the gasoline engine—certainly plaintiff would not have made this expenditure but for the milking machine. Skinner says:

“I bought it to run this machine with. I do not consider that it is worth anything to me to run the separator with, because I have to pay my men the same to separate it by hand. I could not dispose of it. I suppose it is of some value” (140).

Defendant's witness, Briggs, without ever seeing the engine, fixes its value in December, 1914, at 50% of its cost (231).



With reference to the \$370 for lumber, cement, lime and nails—this is another expenditure attributable directly and solely to Skinner's effort to use the milker—"They told me that I would have to build stanchions before they could install the machine" (143). Except for the milker these stanchions had no value; in fact when milking by hand they constitute a hinderance, placing the milker in such close proximity to the cows, shutting off the air and breeze.

"In the spring, summer and fall, it is so hot, you get in there, the men will not work—unless you have got an extraordinarily cool place, they object to it—you can build what we call California shingles—build a shed and the cows walk under that, and most men prefer that to a barn of any kind, because it is cooler and there are very few people that have those stanchions" (143).

In other words, in Imperial Valley where they have no rain, shade is all that is needed. The cement floor was necessary only because of the stanchions holding the cows in one place so long. But for the stanchions the cows would walk around in the open yard where the sunshine and dry air would go a long way towards taking care of the droppings.

"In the Imperial Valley, the sunshine through one day's time will dry nearly anything, and it will be just as dry as it can be in a day's time" (158).

The question, then, of plaintiff's loss from expenditures made to install and operate defendant's

machine being an open question of fact and having been submitted to the jury under a proper instruction of the court, it will be presumed that they followed the instruction and fixed a proven value upon the equipment left on Skinner's place after the abandonment of the milking machine. Any amount so determined upon by the jury which was substantially less than the initial cost would find support in the evidence and be upheld on appeal.

With reference to plaintiff's claim for loss of butter fat, one thing that was clearly proven beyond peradventure was that the direct and proximate result of the use of the milking machine upon Skinner's cows was a shrinking in the amount of milk the cows gave.

First all cows that were milked by the milker gave less milk than when milked by hand, even though they were not injured (126).

Then there were a great many cows that developed swollen quarters but whose injuries were not permanent. These, while they seemed to return to normal under treatment, yet they never gave as much milk as before receiving the injury (161, 166, 168). There were about thirty in this class prior to June 25 (124, 151, 171). Altogether there were about fifty injured in this way at one time or another (144).

Then there were some twenty cows that were absolutely ruined for dairy purposes (124-151). These had been injured between June 25 and July

7 when Reed, the defendant's expert operator, ran the machine, because Skinner says they were injured before Briggs came (124) and the machine had not been used since July 7; also no cows had been injured up to July 25 (120). These cows developed swollen bags to the extent that they were not worth anything for dairy purposes; "the bags were ruined; the milk would not come through the bags" (121). "There were some that gave a substance, I don't know whether you would call it milk or not, you would not take the milk from them to use" (171). McCulloch noticed that the effect of the mechanical milker was to dry up the cows (283). Six Imperial Valley Dairymen gave their depositions that the use of the defendant's mechanical milker resulted in shortage in the milk (290). Even Reed, defendant's own operator, admitted that the use of the milker on Skinner's herd resulted in their giving less milk (250). "It is a fact that some of Skinner's cows, after the inflammation had set up in their udders, quit giving milk altogether" (Reed 251). With the loss in milk generally admitted by all the witnesses the only question was how great was the loss. Mr. Skinner estimated it at \$1500.00. He was qualified to make the estimate. He had had this dairy about five years. He knew his cows. He had watched their individual performances in order to cut out the poor milkers and build up an extra good herd (111). He took the milk to the creamery and knew what the herd in the aggregate



should do under normal circumstances; he received the daily cream sheets and so kept track of the amount of butter fat his herd was producing and the price at which it was selling. Mr. Skinner had the requisite general knowledge to enable him to make an accurate estimate, and weight should be given to it.

Of course it would have been more satisfactory if plaintiff had kept an individual record for each cow in his herd. But defendant ought not now to take advantage of plaintiff's condition which results from his relying on defendant's representation and warranties and not foreseeing that he would be compelled to sue defendant company in order to secure redress. Because the exact amount of the damage is difficult of ascertainment is no reason for denying any and all relief whatever, where it is clearly proven that damages were actually suffered.

But the damage on this point is not left to conjecture as learned counsel on the other side think. Mr. Skinner very correctly says at page 138:

“There are two or three different ways of arriving at the damage of \$1500 for loss of butter fat. In June, my cows were averaging better than \$6 apiece for the butter fat. There were 20 of those cows knocked out the last of June or the first of July. You multiply the number of cows that were out of the herd by the average; those cows that were injured were over average cows. That is the way that I arrived at the amount of butter fat I lost each month. You take the average

of the herd and you multiply that then by the number of months between the time these cows went out and I brought this suit”.

Twenty cows at \$6 each per month for twelve months (the suit was started July 6, 1915) would amount to \$1440. But it is only fair to notice that the price of butter fat in June was only 26 cents, while every month but two in the remainder of that year it was higher, reaching 31 cents in October, 34½ cents in November and 30 cents in December (293). In this connection also, observe that “cows give more at some seasons of the year than others”. In Imperial Valley as a rule the months of October, November and December are the best months of the year (139).

Furthermore the \$1440 loss of butter fat arrived at in this way does not include the shortage, testified to, in the other 30 of the 50 cows injured by the milker (144). These were injured in one or more quarters and while they seemed to return to normal never gave as much milk afterwards (161, 166, 168). Nor does it include the shrinkage in the remaining fifty cows who were not visibly injured (126).

So it seems to us that there is sufficient evidence to support an item of damage for at least \$1440, for loss in butter fat due directly to the operation of defendant's milker on plaintiff's cows.

This, then, would leave the case as far as the items of damage go, as follows:

Loss caused by injuries to the cows (conceded)		\$2005.00
Loss caused by pasture (conceded)		420.00
Loss by butter fat proven		1440.00
Loss by purchase and installation of milker		
Cash paid for milking machine (conceded)	\$461.42	
Loss on gasoline engine 50% of cost value as fixed by defendant's witness after milker was abandoned	87.50	
Loss on lumber, cement, etc. depreciation 50% of cost, same basis as fixed for engine	185.00	733.92
		<hr/>
Total damages		\$4598.92

We submit that the jury in returning verdict of \$3763.92 were well within the evidence.

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### III.

**ANSWERING CONTENTION THAT THE EVIDENCE FAILED TO ESTABLISH THAT THE DAMAGE WAS CAUSED BY THE SHARPLES THREE UNITS AS DISTINGUISHED FROM THE SO-CALLED EDGAR UNIT.**

First, there is evidence sufficient to support the theory that Edgar Bros. acted only as sales agents



for Sharples Separator Company in selling plaintiff the fourth unit. Before the trial the plaintiff contended that Edgar Bros. were necessary parties defendant on the theory that they had sold plaintiff the fourth unit and therefore were liable for any damage caused by it. On this theory we named them parties defendant and filed our suit in the state courts. Thereupon defendant company filed a petition for removal to the United States courts on the ground that Edgar Bros. Company was not a necessary or proper party defendant, and F. A. Frank, managing agent for defendant Sharples Separator Company, made affidavit in said petition that Edgar Bros. Company was paid a commission for the sale of said machine to plaintiff and "was acting at all times herein simply and solely as agent for your petitioner" (17). The state court thereupon transferred the case to the Federal court and plaintiff's motion to remand was denied. The case coming on for trial Edgar Bros. Company's motion for a nonsuit, on the ground that they had acted merely in the capacity of a sales agent, was granted.

Hickson was the salesman for Sharples Separator Company who sold plaintiff the milker (111). Hickson had Edgar Bros. Company's man with him at the time (174). Skinner says that Hickson told him, "any time I want another unit I could either get it through them or notify Mr. Edgar and they would get the unit for me" (174). "I went to Mr. Edgar and he ordered the fourth

unit for me. I just told Mr. Edgar to order the fourth unit for me and he did" (174).

The Sharples expert operator, Reed, returned to Skinner's ranch to try and fix up the milker at Edgar Bros. instigation (121). When Briggs, another agent of Sharples Company, came to Imperial Valley in October to get Skinner to permit further tests on his cows, he took Skinner to Edgar Bros. to get the agreement fixed up (123). When Reed failed in his last attempt and quit in December the first place he went was to Edgar Bros. to talk to Mr. Edgar (133). Skinner offered to return the milker to Mr. Edgar (134). In fact, the evidence, all through the record, shows that Edgar Bros. Company was acting for the Sharples Company. Skinner says, "I would notify Mr. Edgar and he would pass the communications to Sharples people" (162). "I would make my complaints to Edgar Bros. when Reed and Briggs was not there and they said they would notify the company" (162). Without multiplying quotations from the record we are satisfied to say that there was evidence to warrant the jury in finding that Edgar Bros. Company acted in a representative capacity only when it ordered and delivered the fourth unit to Skinner.

Secondly, it is immaterial whether or not the fourth unit was covered by the express warranty stated in the contract of sale. The Sharples Company manufactured the fourth unit; they manufactured it for the purpose of having it used in con-

junction with other like units for milking cows; they put it on the market to be sold for the purpose of being used to milk cows; they thereby impliedly warranted that it could be safely used for that purpose. The unit was ordered from defendant company for use by Skinner. They had consented in advance that an additional unit might be used on the milker; it was to their financial advantage to have Skinner buy the fourth unit; it made no difference to them whether the fourth unit was delivered to Skinner through parcel post, or by express, or through Edgar Bros. Company, or by their own salesmen. They told Skinner as much (174). Skinner only followed the company's instructions when he purchased through Edgar Bros.; the Sharples Company is as much liable for the effects of the fourth unit as it is for the other three units. Their implied warranty was the same as their expressed guarantee. They knew of its being used and made no objection. In fact, their own expert himself, in June and April, used it for milking Skinner's cows. The four units were absolutely identical (231); it was impossible to tell one from the other (136). There is nothing in the suggestion that the trouble was caused by using four units instead of three.

Thirdly—and this is the controlling point regarding the fourth unit, it is immaterial who sold Skinner the fourth unit because the injury was done while the company's man was operating it. It would be the same even if the fourth unit was of



an entirely different make. The company's man went to the Skinner Dairy, under the company's instructions, and in the course of his employment took charge of all four units and operated them from June 25 to July 7 and also probably used the fourth unit from October 20 to December 20, 1914. The company, therefore, is absolutely liable for all the ordinary and natural consequences of the act of its agent done in the course of his employment.

No one disputes that Reed was working for the Sharples Company and under its direction when he took charge of the milker and operated it on Skinner's cows from June 25 to July 7; Reed says so himself (245-246). F. A. Frank, "sales-manager of the San Francisco office" for Sharples Company, and under whom Reed was working, admits that he sent Reed to Skinner's place between June 20 and July 6. "*Reed was to do anything that was necessary to straighten things out*" (255). Reed says: "I restarted the machine. It was operated under my direction" (246). And this period, June 25 to July 7, is when practically all the damage to Skinner's cows occurred (120, 121). "No one there attempted to exercise supervision over him; he took charge; he put the machine on all the cows and ran it about two weeks" (171).

Reed came back again in October and again ran the milker from October 20th to December 20th, 1914. Witness Frank undertakes to deny that Reed was in the company's employ during this period, but the evidence is the other way. The

company was anxious to get the milking machine going again at the Skinner Dairy after it had been stopped July 7, 1914. If they could get this machine running satisfactorily "a lot more business there", where dairying is one of the principal industries (258). The company therefore sent Briggs to the Skinner ranch to "find out what was wrong and straighten out the trouble" (Frank 253, 256). The first thing Briggs wanted to do was to restart the machine. Skinner refused (123); he had suffered injury enough; any curiosity he may have had regarding the operation of the machine was more than satisfied. He feared the evil results of any further use of the milker; his wife was protesting bitterly (172). The company's man, however, persisted. The company could not expect to get "a lot more business down there" after the disastrous results of Reed's previous attempt in June and July. It was important to the company to offset the unfavorable effect produced by their previous effort. Hence Briggs refused to take "no" for an answer. Finally, to satisfy Skinner, Briggs, acting for the Sharples Separator Company, gave him a written agreement. Even then Skinner was not satisfied, "I desired a witness", he says (123). "But for my receiving the written paper, I would not have allowed Reed to restart the machine" (Skinner 123). And Skinner further explains how Reed came to be selected to operate the machine: "Mr. Briggs asked me, when he wanted to send a man, if I had any pref-

erence as to whom he sent. I told him I did not; I said 'You will do'. He said 'I can't do it, I am too high priced a man \* \* \* how will Reed do?' I said, 'Reed will do all right, you can send anybody you want. It is up to your people, the Sharples Separator Company' (132). This same Briggs was called as a witness for defendant company and he did not contradict any of Skinner's statements (231-232). Frank, while denying that Reed was then working for the company, admits that he, the sales-manager for the company, did send Reed down to the Skinner place (256). Admits that the company paid his railroad fare (257). Admits that Reed reported to him, the sales-manager (258, 256). Admits that Reed's letters were placed in the company's regular files (256). Admits that the company was financially interested in the outcome of Reed's efforts (258), but still attempts to avoid the responsibility when Reed failed. On this point, however, Frank is directly contradicted by Reed himself. Reed testified:

"I started to work for them (Sharples Separator Company) on the first of June, 1913, and continued to work for them until January 15, 1915" (240).

This covers the period in dispute. But Reed touches on this point specifically:

" Q. When next were you there?

" A. October 20 to December 20.

" Q. What was the occasion of your being there at that time?

" A. To take charge of the mechanical milker. I was working at that time for the



Sharples Separator Company. While there on the Skinner ranch at that time I operated the milker'' (246-247).

The foregoing certainly constitutes sufficient basis for the evident conclusion of the jury that Reed was acting for the defendant company during the time he operated the milker.

Regarding this October to December test Skinner says:

“Mr. Reed did all the using; he did everything; I never touched it, and none of my men. I gave my men strict instructions not to touch the machine under any circumstances” (128-129). “Mr. Reed had absolute control of it; I had nothing to do with it at all” (129-130).

In view of this state of the evidence—the uncontradicted testimony that the cows had suffered no permanent injury prior to June 25 (120) and that Reed was in charge of the milker at all times it was operated thereafter (122)—the jury was warranted under the instruction of the court (299) in holding the defendant company liable for all injuries inflicted on Skinner’s cows by the milker while being operated by an agent or employee of the company—and this without regard to who sold Skinner the fourth unit.

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#### IV.

#### ANSWERING THE CONTENTION THAT THE EVIDENCE FAILS TO SHOW THE BREACH OF ANY WARRANTY.

The Sharples Separator Company sold plaintiff the milker in question under the following warranty:

“The company further guarantees this machine to be in all respects as represented in its printed matter, and to be capable of doing the work as claimed therein”.

Defendant's counsel have advanced the contention that plaintiff cannot recover because “no printed matter was attached to the contract or made a part of the contract in any recognizable manner or identified in any way by the contract itself” (Brief 178).

We do not believe this argument does justice to the defendant company. Until we are convinced otherwise, we are going to presume that the company worded its guarantee with an honest intent and purpose. We believe the guarantee was intended to mean something. We believe it was intended to mean what the words imply. We refuse to believe that the guarantee was artfully worded so as to prove a trap for the unwary. We refuse to believe that any respectable concern would descend to trickery and chicanery in its advertising or in its contract. But if it did, no court of justice would countenance its scheme; no court would approve a construction of a contract which would open the door to fraud and deceit and enable an unscrupulous and designing person to impose with impunity upon a fellow being.

No, the guarantee means exactly what it says. The company proposes to stand squarely back of every word it says regarding its own product. Very

properly the company limits its liability to its "printed" representations. This is not an uncommon qualification owing to the well known difficulties in controlling the oral representations of zealous salesmen intent on earning large commissions. But aside from this one limitation and restriction, the company clearly guarantees that it will stand back of the representations contained in *all* its printed matter. The inclusion of one restriction is the exclusion of all others. With this rational and honorable interpretation of the contract, the element of indefiniteness and uncertainty is gone.

Of course there is this further limitation which underlies all warranties, namely, that it should have been relied upon and induced the purchase. Defendant contends that there is a lack of evidence on this point. The following is the evidence:

"The negotiations (regarding the mechanical milker) were opened by one Mr. Hickson, on behalf of the Sharples Separator Company people. Up to that time I did not know anything about the Sharples Separator Company or about any mechanical milker. Their sales agent delivered to me certain printed literature published by the Sharples Separator Company, *which I read and believed and acted upon*; I bought a milking machine" (Skinner 111-112).

The various pieces of printed literature of the Sharples Separator Company which their agent delivered to Skinner during the negotiations, for the evident purpose of inducing him to buy their



milker, and which Skinner testified he read, believed and acted upon, were subsequently separately and specifically identified and admitted into evidence as plaintiff's exhibits 2, 3 and 4. Defendant cannot now object to plaintiff's identification of this printed matter merely because he said

“this pamphlet or *one like it* was given to me by the agent of the Sharples Separator Company during the negotiations for the sale of their machine”.

This is a sufficiently definite identification as there were doubtless many thousand pamphlets of the same issue, which were exactly identical and it would have been impossible for plaintiff to have distinguished the one given him from another of the same issue. The important thing was, not that the exact pamphlet should be identified, but that the printed representations of the company should be identified. We submit that this was done.

Anyway, no objection was made at the trial to the introduction of the printed matter on the ground that it had not been sufficiently identified; nor did anyone on behalf of the defendant company deny that plaintiff's exhibits 2, 3 and 4 were printed matter published by defendant company and by its agent delivered to Skinner as testified to by him.

In the printed matter offered and received in evidence as plaintiff's exhibits 2, 3 and 4 were distinct representations or warranties that the milker would not injure the cow.

“It gently massages the cows teats, keeping the teats and udders of the most delicate and hardiest cow in a soft, cool *natural*, perfect condition, *free from congestion*” (115).

“The Sharples Mechanical Milker \* \* \* *not only absolutely prevents all irritation of teats and udders but actually benefits the cows*” (116).

“The high grade cow is much safer when milked by the Sharples Milker than when milked by hired help and *just as safe as when milked by the owner himself*” (117).

The printed literature also represented that the use of the milker would not lessen the amount of milk received from the cows.

“The gentle massage of the teat cup with its uniform action induces the cows to let down the milk freely, a condition which frequently increases milk production” (115).

“The Sharples Mechanical Milker \* \* \* improves the flow of milk” (116).

“*There is not the least tendency to dry up the cows prematurely* nor have any other harmful effect” (118).

Now the evidence which we reviewed in answer to defendant's first contention, and which is not necessary to repeat here, clearly and conclusively shows that both these representations or warranties were breached; that the direct effect of the use of the milker on Skinner's cows was to seriously and permanently injure many of them, and lessened the amount of milk received from them.

Defendant's next point is that the foregoing quotations from its printed matter constitute “representations” and therefore they are not “warran-

ties.” But a statement may be both a representation and a warranty. The fact that it is an “antecedent statement” does not preclude it from also becoming a warranty under a contract subsequently made. The “antecedent statement” may be incorporated as a warranty in the contract either *in haec verba* or by appropriate reference. The latter is what was done in this case.

Defendant also argues that the quotations from the printed matter relative to its milker are not warranties because they amount to nothing more than “dealers talk”, “descriptive recital”, “exaggerated statements”, etc. This contention marks the wide divergence between the “before” and the “after” talk. At the time this printed matter was given to Skinner the defendant company wanted him to believe every word. The company then told him: “These statements merit special consideration; they are conservative” (115). Now their counsel refer to the same representations as mere “dealers talk” and “exaggerated statements.” But the quotations go far beyond “dealers talk” or “simple commendation.”

When the company said the operation of their milker keeps the cows’ teats and udders in a “natural, perfect condition, free from congestion,” they went beyond mere talk and made a statement of fact regarding something they claimed to know.

When the defendant said its milker not only *absolutely prevents all irritation of teats and ud-*



ders, but actually benefits the cows, they made a representation of *fact* and not of *opinion*.

When the company said there is not the least tendency to dry up the cows prematurely, *nor have any other harmful effect*, it made something more than an “exaggerated statement”—it made an unqualified statement of fact which was essentially untrue.

When defendant company further added: “These statements merit special consideration; they are conservative” (115), it solemnly bound itself to make good the full import of its representations.

In view of these representations how can defendant now say it was mere “puffing” or that it was simply indulging in “dealers talk?” It would stultify its own conscience if it now were to dismiss these representations with the remark that they were “exaggerated statements”, which Skinner ought to have known better than to have believed, when they at the time told him they were *conservative*. These, like all the other representations, were not said orally, in the excitement of a sale transaction, but were deliberately written out, and put into cold type. Skinner had a right to believe them and act upon them, which he did when he purchased one of their milkers. He operated it according to the company’s instructions and according to the conditions of the sale. The conditions of sale merely epitomize the contents of the book of instructions. We have already shown in the beginning of our brief that these were complied with. Defendant’s

contention that the conditions of sale were not observed, is without force, first because untrue, and secondly because all the damage was done while their own expert operator was running the machine. And this covers the point also that the warranties referred only to the time of the sale. However, there is no evidence anywhere in the record that the mechanical condition of the machine changed at any time subsequent to its installation. The presumption is that there was no change. It was the duty of the company's experts to see that the dairymen using their milking machines kept them in good order (118). The company's experts were at Skinner's ranch repeatedly, yet none of them suggested any change in the machine. The dirt referred to as having gotten into the machine was simply the result of its three month's disuse. There is no evidence that it was ever operated in a dirty condition.

In conclusion, we can only add that all the arguments attacking the sufficiency of the evidence merely present cases of conflicting evidence, and the findings of the jury in each instance are binding and conclusive on appeal.

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## V.

### **ANSWERING THE CONTENTION THAT ERROR WAS COMMITTED IN ADMITTING PRINTED MATTER.**

Our answer to this contention has already been given in answering the preceding point. The warranty found in the contract of sale is broad enough

in its terms to include all the company's *printed* representations regarding its milking machine. The particular printed matter on which plaintiff relied was sufficiently identified by him, particularly in view of the absence of any objection on this point at the trial.

A general objection that certain proffered exhibits are "incompetent, irrelevant and immaterial" is insufficient to cover a want of identification.

People v. Louie Foo, 112 Calif. 17, 21, 22.

The representations, we submit, go beyond "the expression of hopes, expectations and beliefs." They amount to representations of fact. They warrant that their machine would do certain specified things and that it would not do certain other things. If it is true as contended for by defendant, that a statement as to what a machine would do in the future is not a warranty—then we have restricted warranties to a very narrow class.

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## VI.

### **ANSWERING THE CONTENTION THAT ERROR WAS COMMITTED IN ADMITTING INCOMPETENT CONCLUSIONS OF WIT- NESSES.**

Under this head complaint is made of a number of the rulings of the court. We will consider them *seriatim*.

1. Counsel contend that error is disclosed in the following record:



“MR. SKINNER. They were to send this demonstrator there once a month to go through my herd and see if everything was working all right.

“MR. PARK. We move to strike out the last statement of the witness as to the duties on the part of the Sharples Separator Company.

“Said motion to strike out was then and there denied” (120).

The question which preceded and called for the testimony given by Mr. Skinner is not set out in the record nor is any objection to that question shown.

“An objection cannot be taken for the first time by a motion to strike out.”

People v. Nelson, 85 Cal. 421;

People v. Samario, 84 Cal. 484.

The motion to strike should have stated the specific grounds of the motion. The fact is it stated none whatever. Having failed to direct the court's attention to the feature claimed to have been objectionable, counsel will not now be heard to complain that the court did not of its own initiative perceive that the answer was objectionable on some ground.

“The party must lay his finger on the point of the objection to the admission or exclusion of evidence.”

Martin v. Travers, 12 Cal. 243.

“When an objection is made, the trial court and opposing counsel are entitled to know the ground on which it is based so that the court may make its ruling understandingly.”

3 C. J. 746.

The rule that objections to questions must state the grounds thereof applies with equal force to objections to answers.

“A motion to strike out must show the reason therefor.”

3 C. J. 833;

Katahdin Pulp Co. v. Peltomoa, 156 Fed. 342.

The foregoing is a fair example of many of defendant's points of alleged errors; the record when examined fails to furnish a proper legal basis for any complaint on appeal.

All that Skinner meant by this statement was that he had been told that the company would do this. This is the ordinary meaning of the language.

Skinner was warranted in making the statement. It is evident that he was not attempting to pass judgment on their legal liability. This was substantially what the company had told Skinner they would do. In one of their printed pamphlets delivered to Skinner at the time he bought the milker the following appears:

“We keep enough experts out on the territory to see that all dairymen do keep their machines in good order” (118).

Briggs and Reed were both milking machine experts (252, 253). Munson was another one (283). The duties of these experts were

“to look after milking machines and troubles which customers occasionally have and see that that particular line of work was carried on properly” (252).

For example, Frank says Reed was at Skinner's place about a dozen times during the year (242) looking after his machine. All of which gives a reasonable basis for Skinner's statement.

2. Counsel object because Skinner was allowed to state that he had suffered a loss of milk as the result of the operation of the milker and that he estimated his loss at \$1500.

Certainly it was proper for Skinner to be asked and for him to testify that he observed the effect of the use of the milker upon his cows and that the effect he noted was that the cows gave less milk. If twenty cows were so badly injured by that milker that they gave no more milk it was proper to ask Skinner a question calling for that fact.

Certainly it would have been proper for Skinner to have testified that he got less milk while milking his cows with the machine than when milking them by hand.

The loss of milk was an issue in the case and it was perfectly reasonable and proper to ask him if there was a loss and if so what amount.

Skinner was qualified to estimate the loss. He was the owner of the dairy. He had owned it for about five years (111). He watched the individual performances of his cows because he kept cutting out the poor milkers and building up his herd (111). He had milked his cows by hand and he also operated the milker (146, 147). He sold his



milk to the creamery and received the daily cream sheet showing amount of butter fat and the price at which it sold (137-178). He observed the effect of the use of the milker. He saw some twenty of his cows so badly injured by the milking machine in June, 1914, that they gave no more milk, and who better than Skinner was qualified to give testimony on this point? He possessed the requisite knowledge to make the estimate that he gave.

The right of an owner to place a value on his property is well settled in law. He is presumed to know its value.

See cases tabulated under this head in 17 Cyc. 114 and 115.

In *Clarke v. S. F. etc. Ry. Co.*, 142 Cal. 614 at 616, the plaintiff was asked: "Q. What was the amount of the damage to the machine by fire on that day? A. Five hundred dollars".

The court said:

"The objection urged is that the question called for the conclusion of the witness and not for facts. This may be true, but the character and extent of the injury was fully described by the witness and the defendant had ample opportunity to test the witness on cross-examination as to the basis of his estimate of the damages and did so. \* \* \* Under these circumstances the defendant could not have been injured by the answer given to the question referred to".

What was said by the California court applies to this case.

As to Skinner's statement "if they had not used this milker the cows would have held up", no objection was made to the question which preceded it nor was there any motion to strike it out. Its presence in the case therefore is by mutual consent.

3. The ruling of the court leaving in Mr. Boart's statement (259) that Skinner had "a very good dairy house" is harmless error, if any at all, because the witness immediately proceeded to explain what he meant by that expression and gave the jury the facts on which he based the general statement, to wit, that it had a cement floor all the way through it; that there were gutters, although one was unfinished; that there was no loose manure in the gutters; that the place was clean (259).

Conclusions accompanied by statement of the facts upon which they are based are not prejudicial.

Dollar v. International Banking Corporation,  
(Cal. App.) 109 Pac. 499.

4. The matter which counsel says should have been stricken out of Dr. Cram's testimony, shows on its face to be harmless if not actually in favor of defendant. Witness' very frank statement, on which defendant bases his claim of error, to wit, that his opinion was a presumption only and that he had made no bacteriological or chemical analysis, removed all effect his former statement could have that this germ was not an infectious germ; it was not a contagious germ (275).

This entire subject matter which counsel claims should have been stricken out was brought out on

defendant's own cross-examination and the questions themselves not being in the record and the motion to strike not including the ground that the answers were not responsive to the questions, it will be presumed that they were responsive and that defendant called out by his own questions the subject matter which he afterwards sought to have stricken from the record.

5. With reference to Mr. McCulloch testifying as an expert we submit this is left largely to the discretion of the trial court. If defendant was dissatisfied with the showing of the witness' qualifications he could have asked leave to cross-examine on that point. This he did not do. The cross-examination may generally be relied upon to show witness' ignorance and neutralize the force of his opinions if an error has been committed by the court in admitting an incompetent person to testify. Unless the ruling of the court is palpably and grossly wrong it will not be reversed.

Rogers on Expert Testimony, sec. 22, 23;

Lawson on Expert Evidence, 276, 468;

Gilbert on Indirect Evidence, sec. 209.

We claim witness made a sufficient *prima facie* showing. He testified that he had handled dairy cows all his life—with the exception of seven years; that he was pretty well acquainted with the common disease of cows and that he knew what mammitis is. We submit that this was sufficient (281). Further his general discussion, on cross-examination (287, 288) developed the fact that the



witness possessed technical knowledge regarding that which he was testifying to.

With reference to his knowledge of milking machines, it appears that he was familiar with the operation of three different kinds of milking machines, Sharples, Hinman and the B. L. K. (281). He had observed milking machines operated at other places (288) as well as in Imperial Valley (281). But not only had he seen the milking machine operated but he had himself operated one for about two months (281). Before commencing to operate the Sharples milker, witness had been instructed by a representative of defendant company as well as furnished with a book of instructions with which he familiarized himself (283). We submit in view of this foundation that the trial court did not err in permitting McCulloch to testify upon the subject of mechanical milkers.

Furthermore defendant will not be heard to complain of McCulloch's qualifications when it used five witnesses as experts who possessed even less qualifications (290).

The last objection against McCulloch's testimony to the effect that he was permitted to say that he had followed instructions, was harmless in view of the fact that the manner in which witness operated the milking machine was approved by the defendant's representative Munson. Munson said McCulloch's management and operation of the milker was absolutely perfect (283), which testimony was nowhere contradicted.

The objection to McCulloch's testimony that he "followed the instructions of the company" in operating the milker cannot be considered seriously in view of the fact that counsel for the defendant stipulated that certain other witnesses would testify to the same fact in the same language as appears at page 290, Tr.

City of Denver v. Teeter, 31 Colorado 486;  
74 Pac. 459.

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## VII.

### ANSWERING CONTENTION THAT ERROR WAS COMMITTED IN ADMITTING INTO EVIDENCE ACTS AND DECLARATIONS OF BRIGGS.

There is no question but that Briggs was *in fact* an agent of the Sharples Separator Company at the time in question. He was an expert operator. Reed, another expert operator, *admittedly under the instructions of defendant company*, had taken charge and ran the milker on Skinner's cows from June 25 to July 7. Reed was authorized, "*to do anything that was necessary to straighten things out*" (Frank 255). These are very large powers. Briggs was a higher priced man than Reed (132) and presumably of larger authority. There is evidence to support the contention that Briggs had authority to do what he did. Briggs was sent there "to see if he (Skinner) could not be satisfied." Frank told Briggs to "find out the trouble" (253).

"I was interested in keeping Skinner satisfied, because I was hoping to get a lot more business down there" (Frank 258).

The use of the Skinner machine had been abandoned. Its last operation had been disastrous. It meant dollars in the pockets of the Sharples Separator Company to get the machine running again; to get Skinner satisfied and make some kind of a favorable showing before the dairymen of Imperial Valley. The company had to get the machine running again and it had to secure Skinner's consent before it could do that. Assuming that Briggs had no more authority than Reed, he had authority to do "anything necessary to straighten things out", and under the circumstances this necessarily included authority to secure Skinner's consent to the restarting of the machine, which could only be done by the giving of the written contract.

The agreement placed no additional liability upon the company which it did not already have either under the law or by reason of its guaranty. It is not unreasonable therefore to hold that Briggs was authorized to say his company would do that which in reality it was already obligated to do.

It is interesting to note that notwithstanding the company says that Briggs signed its name to a very important contract without its consent and without any authority to do so, still Mr. Briggs is retained in the employ of the company (252, 231).

The first complaint under this head is that the court erred in not granting defendant's motion to strike out Skinner's statement that Briggs wanted to start the machine again (122). But no grounds were specified in the motion, and therefore counsel



is not in a position to complain of the court's ruling. Furthermore the statement was purely preliminary leading up to the execution of the written agreement and it was a proper part of the foundation to be laid before offering that instrument itself. It is harmless inasmuch as the company itself admitted it wanted the machine started (256, 257, 258).

The next objection arose on the following state of the record:

“The WITNESS. I finally agreed that if they would take charge of the machine on thirty cows——

“Mr. PARKE. If the court please, we object to any agreements entered into by and between Skinner and Mr. Briggs” etc. (123).

Although the court overruled the objection it is absolutely harmless error at most. The witness never completed his answer and made no further effort to state the purport or contents of the written agreement, but confined himself to laying the preliminary foundation for the offering of the instrument (123). Defendant's objection therefore served its purpose and accomplished its end as fully as if it had been sustained by the court. No motion was made to strike out what the witnesses had stated prior to the objection.

Counsel's objection to Skinner's statement, “But for my receiving this written paper, I would not have allowed Reed to restart the machine”, is without basis, as the statement was made without objec-

tion from defendant and no motion was made to strike it out.

The next complaint is based on the following state of the record:

“The COURT. Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?

“Mr. PARKE. I dislike to object to the court’s question, but we object to the question as to the conditions under which he started the use of the machine” (129).

The circumstances under which the machine was restarted in October were material and relevant to the case. Skinner had asked and was entitled to recover those losses incurred by him in attempting in good faith to operate the machine. He had already made or allowed two unsuccessful trials of the machine. He therefore would not be permitted of his own volition to continue the operation of the machine for the purpose of piling up damages against the defendant. He had the right and it was his duty to show the circumstances under which he allowed the milker to restart after previous unsuccessful attempts, in support of his good faith in so doing.

Another complaint arose out of the overruling of an objection to a question propounded to Mr. Skinner relating to possible ratification of the Briggs contract by the company (131).

Assuming that the ruling was erroneous, defendant was in no wise injured by the answer given in

response to it. It was favorable to defendant. The question was:

“I will ask you if at any time since, you have ever received any notice or intimation from the company that that was not a valid contract or guarantee?”

To which witness replied:

“They did notify me” (131).

That is to say that the company did notify him that the Briggs contract was not a valid contract. It was impossible for defendant to have been injured by that answer.

Defendant's next complaint is found in the following record:

“The COURT. Did they ever notify you that Briggs was not their agent and had no authority to do what he did?”

“Exception Number 13.

“The WITNESS. No, sir.

“Mr. PARKE. We move to strike out the answer of the witness.

“Said motion to strike was then and there denied” (131).

We submit the record furnishes the defendant no legal basis for complaint as his motion to strike failed to specify any grounds whatever. Neither was there any objection to the question. The answer was responsive to the question and therefore the motion to strike had no apparent grounds to support it.

“A party cannot wait to see what the answer of a witness will be and then move to strike it out if unfavorable to him.”

Hayne New Trial and Appeal, 502.



The next complaint arose on a state of the record revealed at page 171. Mrs. Skinner having testified that Briggs finally started the milker “under that written paper”, she was asked:

“Mr. SWING. Q. Was it started before or after that written paper was signed by Mr. Briggs.”

Mr. Parke objected on the sole ground that, “there is no evidence of a written contract of any kind” (172). In other words his objection was that the question assumed a state of facts not in evidence. But the contrary is true. Mrs. Skinner had just finished referring to the written paper under which Briggs restarted the machine and Skinner himself had previously testified to the execution of the written contract (123). Therefore we submit that the objection stated was not well founded and was properly overruled.

Plaintiff laid the foundation and offered the written contract in order to show all the circumstances under which the milker was restarted in October and to show that it was not started at the instigation of plaintiff but that he was acting in good faith in permitting a further test. Therefore no error was committed in referring to the acts, declarations and contract under which Briggs restarted the machine.

But in our opinion the whole matter relating to the Briggs contract is settled adversely to appellant’s contention by the company itself introducing

the contract into evidence at the close of the case (291, 293). Defendant at that time made plaintiff's entire bill of particulars a part of the evidence as defendant's exhibit No. 2. Neither the offer nor the order or admission in any wise limited the use or purpose of the exhibit. The bill and its contents went into the record and to the jury for all purposes. Defendant will not be heard to complain of plaintiff's evidence when by its own act it made the same subject matter a part of its evidence.

Reed v. New, 35 Kan. 727; 12 P. 139.

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## VIII.

**NO ERROR WAS COMMITTED BY THE COURT IN ALLOWING THE TESTIMONY OF ALBERT J. REED TO GO IN, AND IF ERROR WAS COMMITTED, IT WAS HARMLESS.**

1. As appears at page 212 of the Transcript, the statements of Reed were objected to on the ground that there was no evidence before the court to show that Reed was the agent of the Sharples Separator Company, and they were "incompetent, irrelevant and immaterial".

There was much evidence in the record showing that Reed was the agent of defendant company during the whole time the mechanical milker was operated, there being a conflict of testimony, merely, with regard to his agency after October 20, 1914. If the trial judge resolved this conflict in the plaintiff's favor, the objection was not well

taken, and was properly overruled. Reed testified at pages 246 and 247 of the Transcript that he was during that time working for Sharples Separator Company. His testimony is as competent as that of any other person on that point.

Montgomery v. Dorn, 25 Cal. App. 666.

Since Reed was the agent of defendant company, what he said was competent, relevant and material. Furthermore, "incompetent, irrelevant and immaterial" alone means nothing. The cases of Union Const. Co. v. W. U. Tel. Co., 163 Cal. 298, and Smith v. Liverpool Ins. Co., 107 Cal. 432, cited by counsel for plaintiff in error, go no further than to say that declarations are not admissible until agency is shown. In neither of those cases was the evidence so strong tending to prove agency, as in the present case, yet in the first case the Supreme Court held that the agency was sufficiently established.

Reed was to operate the milker and report to the company, which is sufficient to show his authority to write and send the telegram.

Counsel's argument to the effect that the company is not bound by the acts of Reed because he had quit, is a waste of words for the reason that counsel misunderstand or misinterpret the meaning of "quit". Reed "quit" milking only, as is shown by his language at pages 132 and 133 of the Transcript, and by the telegram at page 134.

2. If there was error in the admission of the statements of Reed and the telegram, the error was



waived by the defendant in permitting Mrs. Skinner to testify to the same matters without objection (Tr. p. 173).

City of Denver v. Teeter, 31 Colo. 486, 74 Pac. 459.

See also

3 Century Digest, par. 4165.

The most objectionable part of the telegram is the inference that the machine was injuring the cows. Mrs. Skinner at page 173 testified to his statements directly to this effect, without objection.

Reed's statements were made at the time he quit milking, and they were made about the milking, i. e., operating the mechanical milker. They were sufficient, therefore, to satisfy the rules of law as to time, and were concerning the very work he was doing for the company.

3. Defendant made no valid objection to the foundation laid for the introduction of the telegram, and cannot raise the point for the first time on appeal. The transcript, at the bottom of page 133, shows that defendant company furnished to counsel for plaintiff the original delivered copy of the telegram. Reed sent the telegram in the course of his employment, for Frank testified at page 258 that he "asked him to write me, keeping me advised of conditions". Reed did this by wire on this occasion. Since Reed was the defendant's agent at the time he sent the telegram, obviously, the rule contended for by counsel for defendant at page 227 of their brief—that the company must

acknowledge, ratify or act on the telegram in order to be bound—does not apply. That is the rule where a stranger is the author of the telegram, but not so when it is sent by an agent.

4. The telegram was a written report of an agent to his principal, in the course of his employment, and immediately after the injuries referred to therein. It is therefore admissible against the principal under the rule laid down in

La Abra Silver Min. Co. v. United States,  
175 U. S. 423 at pages 498-9; 20 Sup. Ct.  
Rep. 168;

Lipscomb v. South Bend R. Co., 65 S. C.  
148; 43 S. E. 388;

Lemen v. Kansas City Southern R. Co., 151  
Mo. App. 511; 132 S. W. 13;

Hilbert v. Spokane International R. Co., 20  
Idaho 54; 116 Pac. 1116;

Quanah A. & P. R. Co. v. Galloway, (Tex.)  
154 S. W. 653.

According to these cases such a report comes within an exception to the hearsay rule.

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## IX.

**THE COURT BELOW DID NOT ERR IN STRIKING FROM THE TESTIMONY OF MR. FRANK THE STATEMENT "AND I BELIEVE THAT REED NOTIFIED SKINNER TOO".**

This part of the record appears at page 257 of the Transcript. The questions and answers are not in the record as such, but the statement, by its

form, shows that it was not responsive to any question, but that it was gratuitously added by the witness. Furthermore it is the baldest hearsay, and is only a belief, at that.

The rule that an objection must be specific, and that a motion to strike out must state the particular grounds, applies to cases where the evidence is admitted, and not where it is excluded. If an objection is not specific, but is nevertheless sustained, the party who made it may advance any ground which may exist to sustain the ruling. This doctrine springs from the rule that

“a right decision will not be overturned merely because a wrong reason is given for it, provided a sufficient reason exists upon which it may rest; and upon that other rule which calls into action every possible intendment in support of the ruling of a court while holding him who would overthrow it strictly to the specific grounds upon which he has elected to rely.”

Hayne New Trial and Appeal, Vol. I, pp. 522, 523;

Clarke v. Huber, 25 Cal. 593;

Davey v. S. P. Co., 116 Cal. 330, 331.

See also,

Hayne New Trial and Appeal, Vol. II, paragraphs 284 and 285.



## X.

**THE COURT COMMITTED NO ERROR IN EXCLUDING EVIDENCE  
OF THE OPERATION OF THE SHARPLES MECHANICAL  
MILKER IN WESTCHERSTER, PENNSYLVANIA, OR AT SAN  
LEANDRO, CALIFORNIA.**

1. When Dr. George H. Hart, as appears at page 199 of the Transcript, undertook to testify as to how the Sharples Mechanical Milker worked at Westchester, Pennsylvania, the objection was made that "no foundation had been laid". The court sustained the objection.

It is obvious that the testimony does not show that the tests there were made under conditions similar to those existing in the Imperial Valley.

That is what counsel meant when he said "no foundation has been laid". The evidence would not be competent unless conditions were similar, and the court could almost take judicial notice that they were not.

Furthermore, it is within the discretion of the trial court as to how far he will go in permitting the introduction of cumulative evidence. If the ruling was right on any ground it should stand. The court did allow, on behalf of defendant, five depositions on the point as to how the milker worked under similar conditions.

2. The San Leandro case is similar, except that the objection specifically stated (Tr. p. 215) that the offer "does not include any offer to show that the conditions under which this machine was

operated were similar or identical with those under which the machine of the plaintiff was operated”.

The objection stated the fact as appears from the record; it was sustained and an exception noted. There was no offer, or attempt, to show that the conditions were the same.

The testimony offered was therefore incompetent, and the ruling proper.

---

## XI.

**THE COURT PROPERLY EXCLUDED EVIDENCE OF THE EXCLUSION OF IMPERIAL VALLEY DAIRY PRODUCTS FROM LOS ANGELES, DURING THE CROSS-EXAMINATION OF H. D. NYE, BY THE DEFENDANT.**

This is not the proper method of proving Skinner's Dairy unsanitary. There is nothing to show who made the ruling, if one of exclusion was made; nothing to show that Skinner was affected by or bound by it, or that the boycott, if one existed, was based on the condition of Skinner's Dairy.

If the witness had testified that all the dairies in the Imperial Valley were sanitary, the question might be proper cross-examination to test his knowledge, but he testified on direct examination only as to Skinner's Dairy.

This evidence is no more admissible to prove Skinner's Dairy was unsanitary than evidence that all alien enemies were excluded from the waterfront of San Francisco for fear of arson would be admissible to prove a particular alien enemy guilty of arson. To state the proposition is to see the fallacy of it.

The question of whether or not Skinner's Dairy was in fact sanitary is susceptible of proof by direct evidence, and there was no need, even though the rules of evidence should allow such evidence as was attempted to be introduced, of getting at it in such a manner. To permit the introduction of such evidence would open up a multitude of questions which would only confuse the jury. Was Los Angeles right in its boycott? Was Skinner's Dairy considered? If not, shouldn't it have been excepted? And finally, this defendant is not to be judged here on the basis of a boycott placed on the milk of a whole community, or even on what Los Angeles may have thought of his dairy.

At page 271 of the brief for plaintiff in error, counsel say:

“No new ground of objection can now be imported into this situation, and the rulings of the learned judge below must, we submit, stand or fall upon the record as made and presented.”

It is needless to say that this is not the rule.

“The rule that the objection should be specific has no application, however, where a general objection is sustained; in that case, the party against whom the ruling was made cannot urge that the objection was too general.”

Jones on Evidence, second edition, par. 894,  
p. 1147;

Hurlbut v. Hall, 39 Neb. 889;

Mine & Smelter Supply Co. v. Parker Lacy Co., 107 Fed. 881.



“The court is not bound to receive irrelevant evidence, even though both parties consent.”

Jones on Evidence, second edition, par. 172;

Farmer’s Bank v. Winfield, 20 Wend. 421.

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## XII.

### THE HYPOTHETICAL QUESTION ADDRESSED TO DR. HART WAS PROPER UNDER THE EVIDENCE.

The question fairly states the testimony which is correct on the plaintiff’s theory of the case, and is therefore proper.

Union Pac. Ry. v. McMican, 194 Fed. 396.

Taking up the objections made by counsel for plaintiff in error we find that they are not real.

1. The question as to “garget” is explained by Mr. Skinner, at pages 150 and 151 of the Transcript. On page 150 he says he understands by “garget” “when a cow comes in fresh \* \* \*, very often her bag will be swelled and puffed out until the milk gets out.” “I had had cows that had garget, as I understand it, before I used the milking machine. I had had a few cows that were extra heavy milkers, that their quarters would be puffed, not swollen.” And at page 151: “I never had any injury to cows’ teats; I never had any trouble like that; I never had any cows step on it before.” It is apparent that Mr. Skinner applied the term “garget” to an udder puffed by an over supply of milk and swollen on that account.

Dr. Hart, however, defines “garget” as “caked udder” (Tr. p. 190). It is to be presumed that “garget” was used in the question, in the sense it was used by Dr. Hart, the expert. According to Skinner’s testimony there had been no case of “caked udder” in his herd.

2. The contention that Reed was not an “expert operator” ill-becomes the plaintiff in error.

Frederick A. Frank, the sales manager of defendant company at San Francisco, testifying on behalf of the company at page 253, Tr., says:

“I know Albert John Reed. He was with the Sharples Separator Company as a *milking machine expert* for a period of about nine months. \* \* \* Mr. Reed was engaged to install milking machines and to instruct purchasers of the same in their proper use. He worked under the direction of the San Francisco office.”

The company sent him to Skinner as an expert, and is estopped to deny his qualifications.

3. There is evidence that the “machine was cared for.” The parts in question were the teat cups and they were kept in lime water to sterilize them, according to instructions (Tr. p. 149). The machine had “gotten dirty” before it was started again in October (Tr. p. 129) because it had not been used since July. But it was cleaned before it was started up in October (Tr. 129, bottom of page).

4. The evidence justifies the statement in the question that the machine “was cared for and

operated in accordance with instructions furnished by the defendant company.” (Tr. p. 148, bottom of page.) Reed’s instructions were also instructions of the company, (Tr. p. 253) for the sales manager of the company there says Reed was employed “to instruct purchasers of the same in their proper use”.

5. The other objections to the hypothetical question are as ill-founded as the ones we have answered particularly, and it is a waste of time to treat them individually.

The alleged errors of omission covered at pages 296-7 of the brief of plaintiff in error are all answered by the statement in the question that the machine was operated according to instructions.

6. The point that an opinion was not founded on all the facts of the case, “goes to the weight of his evidence rather than to its competency and materiality”.

Reardon v. Richmond Land Co., 21 Cal. App. 357 at 359; 131 Pac. 894.

This honorable court, in the case of Swensen v. Bender, 114 Fed. 1, at page 6, upon a similar objection to a hypothetical question, said:

“The objection to this question was that ‘It was based upon facts not in evidence, and upon a hypothetical nervous condition subsequent to the accident, of which there was no evidence.’ This objection was properly overruled. There was testimony offered upon every fact specified in the question. It is always proper to permit such questions to be answered,



and it is not, as a general rule, necessary that the questions should embrace or cover all the facts of the case. The authorities upon this point will be found in *Railroad Co. v. Roller* 41 C. C. A. 22; 100 Fed. 738, 754; 49 L. R. A. 77."

Furthermore as appears (Tr. 207) the witness evaded a direct answer to the question, so defendant was not prejudiced, even though it should be held that the question was not in proper form.

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### XIII.

**THE COURT DID NOT ERR IN PERMITTING MR. SKINNER TO TESTIFY AS TO THE AMOUNT OF HIS LOSS IN BUTTER FAT AND RESOLVE IT INTO DOLLARS AND CENTS.**

There is a distinction between "loss" of butter fat and "damage" suffered. Skinner did not testify as to what his damage was.

At page 138 of the Transcript Skinner gives the basis of his estimate and the jury has all the facts. It does not harm the defendant for Skinner to make the computation and state his loss of butter fat in dollars and cents.

---

### XIV.

**THE INSTRUCTIONS TO THE JURY WERE FULL, FAIR AND PROPER.**

The first assignment is a fair sample of the rest, and falls of its own weight. Counsel cannot seri-

ously urge that the statement of the trial court to the jury, of what the case is about constitutes an assumption on the part of the judge that losses were actually suffered. The judge below simply characterized the nature of the action, as the court in the trial of a defendant for murder might well say, and without harm or error: "This is an indictment for murder." Would counsel say that he thereby told the jury that he believed murder had been committed? No one seeking the truth would make such a claim. A further reply to such objections would be an imposition on this honorable court.

---

**CONCLUSION.**

For the foregoing reasons we submit that the evidence fully supports the verdict and judgment; that no reversible error appears in the rulings of the trial judge and that the judgment should be affirmed.

Dated, San Francisco,  
March 2, 1918.

Respectfully submitted,

PHIL D. SWING,

M. A. THOMAS,

*Attorneys for Defendant in Error.*





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

In the Matter of H. S. WHITE, Doing Business  
Under the Name of H. S. WHITE MACHIN-  
ERY COMPANY, Bankrupt.

WILLIAM R. PENTZ, as Trustee in Bankruptcy of  
the Estate of H. S. WHITE, Doing Business  
Under the Name of H. S. WHITE MACHIN-  
ERY COMPANY,

Appellant,

vs.

H. S. WHITE, Doing Business Under the Name of  
H. S. WHITE MACHINERY COMPANY,  
Bankrupt,

Appellee.

---

**Transcript of Record.**

---

Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

---

**Filed**

JUL 3 - 1917



**United States**  
**Circuit Court of Appeals**

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INDEX TO THE PRINTED TRANSCRIPT OF  
RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the Southern Division of the District Court of the  
United States, Northern District of California,  
First Division.*

No. 8700.

In the Matter of H. S. WHITE, Doing Business Un-  
der the Name of H. S. WHITE MACHIN-  
ERY COMPANY,

Bankrupt.

**Names and Addresses of Attorneys of Record.**

For the Trustee and Appellant:

CLARENCE A. SHUEY, Esq., and WIN-  
FIELD DORN, Esq., both of San Francisco,  
California.

For the Bankrupt:

WILDER WIGHT, Esq., 5221 Broadway, Oak-  
land, California.

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*In the District Court of the United States, in and for  
the Northern District of California.*

No. 8700.

In the Matter of H. S. WHITE, Doing Business Un-  
der the Name of H. S. WHITE MACHIN-  
ERY COMPANY,

Bankrupt.

**Amended Praecipe for Transcript of Record for Use  
on Appeal.**

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record in the  
above-entitled matter to be used by the undersigned



trustee on appeal to the United States Circuit Court of Appeals for the Ninth Circuit under Section 25 (a) (2) of the Bankruptcy Act of 1898, as amended, from that certain judgment of the above-entitled court made and entered herein granting a discharge to the bankrupt herein. Please include in the said transcript the following documents:

1. This Praecipe.
2. The application of the bankrupt for a discharge, including notice, affidavit, and certificate.
3. From the Trustee's Second Account and Report and Petition for authority to oppose the discharge (marked "exhibit No. 7" by the referee), from the words "respectfully represents," page 1, omit to the end of paragraph two, page 14, ending with the words, "something can be realized further on them," and include all that follows from said ending to the bottom of page 16.
4. From the order settling the second account and report and order authorizing the trustee to oppose the discharge, Bkts. Ex. No. 9, the 1st paragraph, and then omit to the words "It is hereby ordered that the second account be," etc., and then commencing with said words and continue to the bottom of said page 2.
5. Appearance of trustee in opposition to bankrupt's [1\*] application for a discharge.
6. Specifications of objections of the trustee to the application of the bankrupt for a discharge.
7. Answer of bankrupt to specifications of objections of trustee to bankrupt's application for a discharge.

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\*Page-number appearing at foot of page of original certified Transcript of Record.

8. Certificate, pages 1 to 37, inclusive, of the referee in bankruptcy to whom was referred the issues joined by the opposition of the trustee herein to the bankrupt's application for a discharge, in which certificate said referee reported the facts and his conclusions upon said issues to the District Court.

9. Opinion of Judge Dooling, dated February 23, 1917, granting the application of the bankrupt for a discharge.

10. Motion of trustee for an order vacating said order of above court made on the 23d day of January, 1917, granting said bankrupt a discharge and for a further order re-referring the matter to the referee with affidavits of Clarence A. Shuey and Winfield Dorn presented to the Court on said hearing.

11. Petition of the trustee for rehearing presented to said court and heard at the time of the hearing of said motion to vacate.

12. Affidavit of Wilder Wight presented by counsel for the bankrupt on said hearing of the motion to vacate said order of the above court granting the bankrupt a discharge.

13. Judgment of the above court dated February 8, 1917, denying the motion of the trustee to vacate the previous orders of the above court granting said discharge and denying the petition for a rehearing.

14. Petition for appeal by trustee in bankruptcy and order allowing appeal.

15. Assignment of errors on appeal. [2]

16. Citation on appeal.

17. Admission of service of petition for appeal and order and assignment of errors.



18. Statement of evidence.

19. Stipulation for Diminution of record.

Dated February 17th, 1917.

CLARENCE A. SHUEY,  
WINFIELD DORN,

Attorneys for William R. Pentz, Trustee of the Es-  
tate of the Above-named Bankrupt.

WILDER WIGHT,  
Attorney for Bankrupt.

[Endorsed]: Filed Apr. 16, 1917, at 2 o'clock and  
30 min. P. M. W. B. Maling, Clerk. By T. L. Bald-  
win, Deputy Clerk. [3]

---

(Title of Court and Cause.)

**(Petition for Discharge.)**

To the Honorable MAURICE T. DOOLING, Judge  
of the District Court of the United States, for  
the Northern District of California:

H. S. White, of the County of Alameda, State of  
California, in said District, respectfully represents  
that on the 19th day of May, 1914, he was duly ad-  
judged a bankrupt under the Acts of Congress relat-  
ing to bankruptcy; that he has duly surrendered all  
his property and rights of property and has fully  
complied with all requirements of said acts and of the  
orders of the court touching his bankruptcy.

WHEREFORE he prays that he may be decreed  
by the Court to have a full discharge from all duties  
provable against his estate under said bankrupt acts  
except such debts as are acknowledged by law from  
such discharge.



Dated this 1st day of April, 1915.

H. S. WHITE,  
Bankrupt.

(Duly verified.) [4]

---

(Title of Court and Cause.)

**Notice of Hearing Application for Discharge from  
Debts.**

Whereas application has been made by the above-named bankrupt, for a discharge, as provided by Section 14a of the Bankruptcy Law, approved July 1, 1898, it is ordered: That a hearing be had on such application before the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States for the Northern District of California, at the courtroom of said Court, in the United States Courthouse and Postoffice Building, in the city and county of San Francisco, State of California, on Saturday, May 15th, 1915, at the hour of 10 A. M. and at said time and place all creditors of said bankrupt, and all other parties in interest, may show cause, if any they have, why such application should not be granted.

Dated April 14, 1915.

ARMAND B. KREFT,  
Referee in Bankruptcy. [5]

---

(Title of Court and Cause.)

**(Affidavit of Mailing Notice to Creditors.)**

J. O. England, being duly sworn, deposes and says:  
I am employed in the office of Armand B. Kreft, ref-

eree in bankruptcy and more than eighteen years of age; on the 14th day of April, 1915, I deposited in the Postoffice in said City and County of San Francisco copies of the annexed notice to creditors, each contained in a securely closed envelope, franked by proper notice of official business whenever addressed to a place within the United States, and duly post-paid whenever addressed to a place without the United States, and duly directed respectively to each of the creditors of said bankrupt named in the schedules filed herein, at the respective addresses stated in said schedules, except in the cases, where the creditor has designated an address other than that stated in said schedules, and in such case to designated address as on file herein.

J. O. ENGLAND.

(Duly verified.) [6]

---

(Title of Court and Cause.)

**(Certificate of Referee on Application for  
Discharge.)**

To the Honorable MAURICE T. DOOLING, Judge  
of the District Court of the United States, for the  
Northern District of California:

I, Armand B. Kreft, Referee in Bankruptcy,  
to whom was referred the above-entitled matter, do  
hereby certify:

That on the 1st day of April, 1915, the bankrupt  
above-named filed with me his application for dis-  
charge from his debts, in accordance with the provi-  
sions of the Act of Congress entitled "An Act to Es-



tablish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898, which application is duly verified by the oath of said bankrupt; and that Saturday, the 15th day of May, 1915, at 10 A. M. before the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States for the Northern District of California, at the courtroom of said Court, in the United States Courthouse and Postoffice Building, San Francisco, California has been fixed by me as the time and place for the hearing of said application; and that on the 14th day of April 1915, written notice of the filing of said application and of the time and place fixed for the hearing thereon was given to the creditors of said bankrupt, by depositing in the United States postoffice in the city and county of San Francisco, State of California, a copy of such notice enclosed in an envelope bearing the frank of Armand B. Kreft Referee in Bankruptcy duly addressed to each of the creditors named in the schedules filed by said bankrupt herein or who subsequently filed claims herein, at his place of residence as the same is designated in said schedules, or as requested by said creditors.

Said application for discharge and a copy of the notice mailed to creditors as aforesaid and affidavit of mailing such notices are transmitted herewith.

Dated this 14th day of April, 1915.

ARMAND B. KREFT,  
Referee in Bankruptcy.

[Endorsed]: Filed Apr. 20, 1915, at 3 o'clock and 30 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [7]



(Title of Court and Cause.)

**(Second Account and Report and Petition for Authority to Oppose Application of Bankrupt for Discharge.)**

To the District Court of the United States in and for the Northern District of California, and to Hon. ARMAND B. KREFT, Referee in Bankruptcy:

William R. Pentz trustee of the estate of the above-named bankrupt, presents herewith his second account and report, and respectfully represents:

\* \* \* \* \*

That the bankrupt herein has filed a petition in the District Court asking that he be discharged from his debts and said application is set for hearing before the above District Court on May 15th at ten o'clock and notices sent out to the creditors thereon. That many of the largest creditors, as well as small ones, have inquired from your Trustee as to whether in his opinion he believes reasonable grounds exist for the opposing of said application by the bankrupt for a discharge. That if so, said creditors desire your trustee to take such steps on behalf of all the creditors as may be necessary to oppose the same. That your trustee has taken the matter up with his attorneys and been advised that reasonably strong grounds exist to warrant the trustee to oppose said application. That it appears from the testimony taken herein, and from information furnished to your trustee, that said bankrupt obtained money or property [8] upon a materially false statement in writing made by him to a creditor of this estate for the

purpose of obtaining credit from such person. That it appears from the testimony of the bankrupt and from the records of the bankrupt's business that he kept a very inadequate, in fact, practically no books showing the financial condition of the bankrupt's business, such as should reasonably be kept in a business of the character and size of the bankrupt's, and your trustee believes that the failure to keep the same was with the intent on the part of the bankrupt to conceal his financial condition so that such financial condition could not be ascertained from said books of account. That there are certain other legal grounds upon which trustee believes the petition may be opposed also. Consequently your trustee asks that an order be made by the above court at a meeting of creditors called for that purpose, authorizing and directing him to interpose objections to said bankrupt's discharge as hereinbefore set forth.

WHEREFORE, your trustee prays for an order of this Court settling and allowing his second account and report and approving all his acts and deeds, and directing the payment of such demands, expenses and fees as the Court may deem just and proper, and declaring a second dividend upon allowed claims, and for an order authorizing and directing him to interpose objections to said bankrupt's discharge, as hereinbefore set forth, and for such other and further



order as to this Court may seem meet and proper.

WILLIAM R. PENTZ,

Trustee.

WINFIELD DORN,

CLARENCE A. SHUEY,

Attorneys for Trustee.

(Duly verified.)

[Endorsed]: Filed Apr. 24, 1915, at 10 o'clock  
and 30 min. A. M.

A. B. KREFT,

Referee in Bankruptcy. [9]

(Title of Court and Cause.)

**(Order Settling Second Account and Report of  
Trustee.)**

The second account and report of William R. Pentz, trustee of the estate of the above-named bankrupt, coming on regularly the 7th day of May, 1915, and thereafter regularly continued to the 25th day of May, 1915, to be heard, due notice of the hearing of said account having been given to all creditors as required by law;

\* \* \* \* \*

IT IS HEREBY ORDERED that said second account be, and the same is hereby, settled and allowed as correct, and that the petition for authorization to the trustee to oppose the discharge of the bankrupt herein be and the same is hereby granted.

IT IS FURTHER ORDERED, that the trustee pay the respective amounts hereinbefore set forth to the respective parties.



IT IS FURTHER ORDERED that a second dividend of five per cent upon all claims be and the same hereby is declared and ordered paid in accordance with the dividend list filed contemporaneously herewith.

A. B. KREFT,  
Referee.

[Endorsed]: Filed Jun. 12, 1915, at 10 o'clock and 50 min. A. M.

A. B. KREFT,  
Referee in Bankruptcy. [10]

---

(Title of Court and Cause.)

**(Appearance on Opposition to Discharge.)**

To the Honorable District Court of the United States, for the Northern District of California, First Division:

William R. Pentz, Trustee of the above estate, having been first duly authorized by the above court to interpose objections to the bankrupt's discharge, at a meeting of creditors called for that purpose, the clerk of this Court will please enter our appearance as attorneys for William R. Pentz, trustee of the above estate.

We desire on behalf of said trustee to file specifications of objections to the application of said bankrupt for a discharge.

Dated this 10th day of May, 1915.

CLARENCE A. SHUEY,  
WINFIELD DORN,  
Attorneys for Trustee.

[Endorsed]: Filed May 11, 1915, at 3 o'clock and 45 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [11]

---

(Title of Court and Cause.)

**(Specification of Objections to Application for Discharge.)**

William R. Pentz, trustee of the estate of the above-named bankrupt, opposes and objects to the granting of the application for a discharge herein by the above-named bankrupt and for ground of such opposition and objection makes the following specification, and on information and belief alleges:

That on or about the 19th day of April, 1913, said bankrupt endeavored to obtain certain credit from time to time with the Bank of California National Association of San Francisco, and for the purpose of obtaining said credit from said bank made, executed and delivered to said bank, on or about said day, a statement in writing in words and figures as follows, to wit:

TO THE BANK OF CALIFORNIA NATIONAL  
ASSOCIATION OF SAN FRANCISCO, CAL.

H. S. WHITE MACHINERY CO.

H. S. WHITE, Prop.

Second-Hand Machinery in All Its Branches.

650-660 Brannan St.

For the purpose of procuring credit from time to time, with the above bank for our negotiable paper, or otherwise, we furnish the following as being a fair

and accurate statement of our financial condition  
on the 31st of December, 1912: [12]

## ASSETS.

Cash on hand in Bank.....	\$ 2,716.18
Accounts Receivable .....	12,647.19
Merchandise in Stock.....	122,654.75
	<hr/>
	\$138,018.12
Plant .....	5,200.00
Building and Fixtures.....	2,200.00
Tools, Equipment, etc.....	700.00
Horses & Wagons, etc.....	1,500.00
	<hr/>
	\$147,618.12

## LIABILITIES.

Accounts Payable .....	1,464.21
Bills Payable (to Bank).....	10,900.00
Bills Payable (for Mdse.).....	3,675.00
	<hr/>
	\$ 16,039.21
NET WORTH .....	131,578.91
	<hr/>
	\$147,618.12

(Signed) H. S. WHITE.

This statement must be signed by an authorized  
officer of the corporation or by a member of the firm.

What is your usual date for taking inventory?

.....Dec. 31st

How much insurance do you carry on merchan-

dise? .....\$12,000.00

How much insurance do you carry on buildings,

etc.? .....\$ 2,500.00



That upon the execution and delivery of said statement as aforesaid said bank lent to said bankrupt certain moneys amounting to the sum of Ten Thousand Dollars (\$10,000) or thereabouts. That it appears from said statement that said bankrupt had liabilities amounting to the sum of Sixteen Thousand and Thirty-nine and 21/100 Dollars (\$16,039.21).

That from the testimony of said bankrupt taken herein, together with the records and files of the above court, it appears that the liabilities of said bankrupt on December 31, 1912, the date on which the financial condition of the above bankrupt was computed in said statement, and on April 19, 1913, the date when said statement was delivered to said bank, far exceeded the sum named in the above statement. [13]

That according to said statement said bankrupt had a usual date for taking inventory, to wit, December 31st. That according to the testimony of the bankrupt taken herein it appears that said bankrupt had no usual date for taking inventories and in fact took no inventory such as is usually taken in a business of this character.

That it further appears that said bankrupt failed to keep books of account or records from which his financial condition might be ascertained so that it appears to be impossible to determine exactly what the financial condition of said bankrupt at said time or at any time subsequent thereto is.

That it further appears from said statement that said bankrupt had merchandise in stock as an asset of the value of \$122,654.75. That from the records

of the above court and the testimony taken herein it appears that the merchandise in stock of the above bankrupt on said December 31, 1912, and on April 19, 1913, was far below said sum.

That said bank in making said loan to said bankrupt relied upon said statement in extending all credit given to said bankrupt, the amount of which appears in said creditor's claim on file herein.

That the statements given in said application for credit by the bankrupt as to his financial condition were false, and that said false statements were made with the intent and for the purpose of obtaining credit from said bank. That said bankrupt with intent to conceal his financial condition has destroyed, concealed or failed to keep books of account or records from which his financial condition might be ascertained. That said statement showing a net worth of \$131,578.91 did not state the true financial condition of said bankrupt at the times hereinbefore mentioned and was [14] false and was made with the intent and for the purpose of fraudulently obtaining credit from said bank.

WHEREFORE, the trustee herein objects to the granting of the application for a discharge herein, and a hearing and the judgment of the above court is asked thereon.

WILLIAM R. PENTZ,

Trustee, of the Estate of H. S. White, Doing Business Under the Name of H. S. White Machinery Co.

WINFIELD DORN and,

CLARENCE A. SHUEY,

Attorneys for Trustee.



United States of America,  
Northern District of California,—ss.

William R. Pentz, trustee of the above estate, being first duly sworn, deposes and says: That he has read the foregoing specification of objections to application of the bankrupt herein for a discharge and knows the contents thereof, and that the statements of fact contained therein are true, according to the best of his information and belief.

WILLIAM R. PENTZ.

Subscribed and sworn to before me this 4th day of June, 1915.

[Seal] JAMES MASON,  
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 5, 1915, at 11 o'clock and 40 min., A. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [15]

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(Title of Court and Cause.)

**(Answer to the Specification of Objections to the  
Application for Discharge.)**

Comes now H. S. White, and for answer to the objections of William R. Pentz in the above-entitled estate, denies and alleges as follows:

1. Denies that on April 19, 1913, the date that said statement was delivered to the Bank of California National Association, that the indebtedness of said bankrupt far exceeded the sum named in said statement.



2. Denies that according to said statement, said bankrupt had a usual date for taking an inventory.

3. Denies that said bankrupt failed to keep books of account or records from which his financial condition might be ascertained; denies that it is impossible to determine exactly what the financial condition of said bankrupt at said time or any time subsequent thereto is or was.

4. Denies that the merchandise and stock of the bankrupt was, on the 31st day of December, 1912, and on April 19, 1913, or at any other time, far below or below the sum mentioned in said statement.

5. Denies that said bank in making the loan mentioned in said objections to said bankrupt relied upon said statement in extending all credit given to said bankrupt.

6. Denies that the statements given in said application for credit by the bankrupt were or are false.

7. Denies that any false statements were made by said bankrupt with the intent and for the purpose of obtaining credit from said bank.

8. Denies that said bankrupt with intent to conceal his financial condition has destroyed or concealed or failed to keep books of account or records from which his financial condition [16] might be ascertained.

9. Denies that said statement did not state the true financial condition of said bankrupt at the time mentioned; denies that said statement was false; denies that said statement was made with the intent or for the purpose of fraudulently obtaining credit from said bank.

WHEREFORE, said bankrupt prays that the objection heretofore filed by said William R. Pentz be denied, and that said bankrupt have judgment of this Court discharging him as prayed for in the petition on file herein.

H. S. WHITE,  
Bankrupt.

(Duly verified.)

[Endorsed]: Filed, Jun. 26, 1915, at 10 o'clock and 45 min. A. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [17]

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(Title of Court and Cause.)

**(Referee's Report on Opposition to Discharge.)**

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, Southern Division of the Northern District of California:

The undersigned, referee in bankruptcy, to whom was referred the issues joined by the opposition of William R. Pentz, trustee of the estate of the above-named bankrupt, to the bankrupt's application for discharge, to ascertain and report the facts and his conclusions thereon, respectfully certifies and reports:

That upon the hearing of said matter Clarence A. Shuey and Winfield Dorn, Esqs., appeared as counsel for the Trustee and Wilder Wight, Esq., appeared for the bankrupt.

The specifications allege two grounds of opposition: first, that the bankrupt obtained credit, to wit:



The sum of \$10,000 or thereabouts from the Bank of California National Association of San Francisco, California, upon materially false statements in writing made by him to said bank for the purpose of obtaining said credit; second, that the bankrupt, with intent to conceal his financial condition, failed to keep books of account or records from which his financial condition might be ascertained.

The bankrupt filed an answer to these specifications, the substance of which answer is a denial that the statement [18\*—1†] to the bank referred to in the specifications did not state the true financial condition of said bankrupt at the time mentioned and denial that it was made with intent or for the purpose of fraudulently obtaining credit from the bank, and the bankrupt also denies that with intent to conceal his financial condition he has destroyed or concealed or failed to keep books of account or records from which his financial condition might be obtained. W. E. Cashman, Esq., appeared for the bankrupt on the filing of said answer. He did not thereafter appear on said matter; Mr. Wight having been substituted as attorney for the bankrupt. On the hearing before the referee, Mr. Wight, on behalf of the bankrupt, interposed certain objections to the sufficiency of the specifications and the legality of the authorization given the trustee to take the opposition, which were overruled. By amendment to the Bankruptcy Act in 1910, it is provided that a trustee shall not interpose objections to a bankrupt's discharge until he has been authorized to do so at a meeting of the cred-

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\*†Original page-numbers in Referee's Report on Opposition to Discharge as same appears in Original Certified Transcript of Record.



itors called for that purpose. The point taken by counsel is that the notice sent out by the referee of the hearing upon the trustee's petition to oppose the bankrupt's discharge did not contain the words that "a meeting of creditors was called for that purpose." The notice reads as follows:

(Title of Court and Cause.)

To the Creditors:

Take notice, that William R. Pentz, trustee herein has filed his Second Account, and that at the office of the undersigned, Room 202 U. S. Court House and Post Office Building, San Francisco, California, on May 7th, 1915, at 10 A. M., said account will be examined and passed upon, and a dividend declared, and further take notice that said trustee has filed herein a petition for an order authorizing him to oppose the discharge of said bankrupt, which will be heard at the time and place aforesaid.

Dated April 27, 1915.

ARMAND B. KREFT,

Referee in Bankruptcy. [19—2]

A copy of this notice was duly mailed to each creditor scheduled by the bankrupt, or if the creditor has appeared herein, to the address as given by such creditor. At the time set for the hearing no creditor appeared in opposition to the making of the order authorizing the trustee to oppose the discharge.

It therefore appears that the creditors were given notice of the filing of the trustee's application, and of the time set for the hearing, which, in my opinion, sufficiently complies with the act. In my opinion the defects of this notice, if any, can still be cured on

ratification by the creditors. It is a provision clearly intended for the protection of creditors and it is not an additional right or privilege extended to the bankrupt. It is significant that the amendment does not provide for notice to the bankrupt of the trustee's application. In my opinion he is not entitled to be heard upon the application and could not review the order made. The order of authorization made by the referee is no doubt a reviewable order and can only be attached on review and then only by a party entitled to review the same.

Counsel also objects to the form of the verification of the specifications which are verified by the trustee to the best of his information and belief.

Counsel cited in his opening brief certain cases which hold that facts stated upon mere information and belief are insufficient on which to ground specifications on the opposition to a discharge.

In case of *In re White*, 222 Fed. 688, it was said:

“Facts stated upon mere information and belief are insufficient upon which to ground specifications in opposition to a discharge. It was not intended, [20—3] by fixing the statutory grounds for opposing a discharge, to afford the objectors opportunity to go upon a voyage of discovery for ascertaining whether, perchance, they might find something that would defeat the bankrupt's purpose.”

Prior to the amendment of 1910, a trustee could not oppose a bankrupt's discharge. It is not to be expected that a trustee, who is often a stranger to the parties in interest, will have first hand knowledge



of the acts of the bankrupt, his information necessarily comes from his investigations in performing his duties as trustee, nor, is it to be expected that each of the persons from whom the trustee obtains information of the facts upon which he grounds his specifications shall join in opposition by verifying the specifications.

The objections found by the Court, in re White, that by permitting specifications on information or belief might encourage creditors to go upon a voyage of discovery, does not apply to a trustee, who, when he takes an opposition, does so only after due authorization by the Court upon notice to the creditors. It is my opinion that the verification of the specifications is sufficient.

The statement of assets and liabilities furnished by the bankrupt to the bank contains the following items:

### ASSETS.

Cash on Hand and in Bank.....	\$ 2,716.18
Accounts Receivable.....	12,647.19
Merchandise in Stock.....	122,654.75
<hr/>	
Total.....	138,018.12
Plant.....	5,200.00
Buildings and Fixtures.....	2,200.00
Tools, Equipment, etc.....	700.00
Horses and Wagons, etc.....	1,500.00
<hr/>	
Total of all Assets.....	147,618.12



## LIABILITIES. [21—4]

Accounts Payable.....	\$ 1,464.21
Bills Payable (to Bank).....	10,900.00
Bills Payable (for Mdse.).....	3,675.00

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\$16,039.21

Net Worth.... 131,578.91

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\$147,618.12

The specifications charge that the statement as to the amount of liabilities is materially false, in that the bankrupt's liabilities on December 31, 1912, the date under which the financial condition of the bankrupt was computed on said statement, and on April 19, 1913, the date when said statement was alleged to have been delivered to the bank far exceeded the sum named, and that the statement of assets, merchandise in stock, \$122,654.75, is materially false, in that merchandise in stock, at the dates above mentioned was far below said sum, and that the statement showing a net worth of \$131,758.91, did not state the true financial condition of said bankrupt at the times aforesaid. The matter has been briefed at length. The brief of counsel for the bankrupts consists of 75 pages. The transcript upon the hearing of the opposition, comprises 164 pages, and the testimony on general examination, so far as it is relative, was admitted in evidence. This testimony covers 230 pages. I have made a summary of such portions of the evidence as I deemed material, leaving counsel to point out to the Court any testimony not referred to by me which they may deem should have been included in the summary. The references

are to the transcript of the testimony taken on the opposition unless otherwise stated. I have arranged the summary of the testimony according to the subject matter, such as transactions with the Bank of California, with the Seaboard Bank, indebtedness owing by the bankrupt at the [22—5] time given in the statement to the bank, the stock in trade of the bankrupt and the books of account kept by the bankrupt. I will take up first the matters surrounding the obtaining of the loan from the Bank of California.

The bankrupt testified that it was not over 48 hours after he first went into the Bank of California to get the loan that the loan was granted, that Mr. Moulton took him into Mr. Anderson's room and that he explained that he wanted to open an account with the bank, that he was being robbed by the Seaboard Bank. That he asked for an accommodation of \$20,000, which was granted him, and that the following conversation took place (pages 107-109):

“Q. What was it? Just state it. A. Well, Mr. Anderson wanted to know why I was leaving the bank where I was banking.

Q. I see. A. I took out a note that I had paid to the Seaboard Bank, and showed him the—he took the note and looked at it.

Q. How much was that note for? A. It was for \$15,000. On the back of the note it showed where \$300 was taken off the face of it at the time I borrowed it, or, in other words, instead of having \$15,000 placed to my credit, there was only \$14,700 placed to my credit, and aside from that



I showed him where the Seaboard Bank was charging me 8% for the money. Mr. Anderson said, "I don't see why you are staying in a bank of that kind that length of time." I said, "Well, I got in there, and I first went in there he didn't do that, but after I began owing him a little money, he began shaving me, both coming and going." And Mr. Moulton laughed to Mr. Anderson, and said, "We have [23—6] heard all kinds of things happening with this gentleman," without mentioning any names, "but we never knew they did things as bad as this. Do you know Mr. Tyson personally?" I said I did. He said, "Do you know him pretty well?" I said I thought I did. Well, he said to Mr. Moulton—Mr. Anderson speaking—"I guess if Mr. Tyson can let this man have \$15,000, we can let him *has* what he wants."

Q. Did they ask you with regard to your business condition, what you were doing, and one thing and another?

A. No, I referred them to anybody that I was doing business with.

Q. Did they talk to you about the matter?

A. Yes, they just asked me if—there was one thing that they noticed in the report that had received, and that was that Mrs. White held a lot of real estate.

Q. In her name?

A. In her name. And they wanted me to explain that. I told him I could not explain it, only the fact that it was her property. Well, he said, "Do you think she would have any objection to endorsing for you?" I told him I didn't think she



would; that I was sure of it. He said, "Do you think she will endorse a note for you, a guaranty note for \$20,000?" I told him she certainly would. Well, he said to Mr. Moulton, "I guess you had better make a guaranty note and give it to Mr. White and have Mrs. White endorse it."

Q. Was that done?

A. Mr. Moulton wrote it out in longhand himself and gave it to me, and told me to take it over to Mrs. White and when she endorses it, he would give me credit for this \$20,000, or that I would be permitted to draw up to \$20,000. And I took this particular document over to Mrs. White, but instead of putting her name where there was a little lead pencil cross marked, she [24—7] put it in the place where the date was, on the bottom.

Q. Was that similar in form to the one that has been introduced in evidence?

A. Yes, sir, just exactly like that.

Q. But it was not that one?

A. Not that one. It was in typewritten form, if I remember right.

Q. What is the history of this one?

A. I brought it back to Mr. Moulton, to his office, and he said, "This won't do. You have got this in wrong place. The date should have been in here." He said, "Just wait a minute." And he took this paper, copied it, gave it to some official in the bank to copy on the machine, and the result was this other one that we have now.

Q. And afterwards did Mrs. White execute the one that we now have?

A. Yes, sir. I took that over. I don't know whether it was that day or not. But I immediately had Mrs. White sign it, and when I came back, Mr. Moulton gave me a bank-book and a check-book. I told him I only really needed \$10,000 at that time. I told him I would like to get rid of some of my small debts that I had, and I never drew more than that ten.

Q. When was this in reference to this giving to you of the bank-book and opening your account? When was this in reference to the delivery of the guaranty signed by Mrs. White?

A. It was that very same day.

Q. Do you mean before, immediately afterwards, or before, or at the same time?

A. After I brought this document signed by Mrs. White.

Q. Then he gave you the credit?

A. Yes, sir, then it was started moving.

Q. At the time of these negotiations and to the time that you procured the money from the Bank of California, had [25—8] you furnished them a statement, the statement here that there has been a good deal of talk about? When did you give them the statement.

A. I gave them that statement after, I should judge—I would not say positively, but about a week afterwards.

Q. About a week afterwards?

A. Yes, as near as I can remember, because he said he observed that there was no such statement in the bank, and it was customary for them to have a



business statement of that kind, and would I please furnish them with one.

Q. Are you sure, Mr. White, that the statement was not furnished before you got the loan?

A. I am positive that it was not.

Q. Well, you have heard Mr. Moulton's testimony.

A. I don't care what Mr. Moulton said. I know positively that it was not so." He further testified that the Bank of California never pressed him for the payment of the \$10,000 loan and never asked him to pay it (page 111).

Concerning the sum of \$8,500 withdrawn from the Bank of California immediately after the \$10,000 loan was made, he testified as follows (Gen. Ex., p. 67) :

"Q. I noticed from your check book that on April 19th, 1913, you withdrew \$8,500 from the Bank of California. What was that drawn for?

A. I drew that money with the original intention of paying it to the Seaboard Bank. I believe there was several attachments. There must have been a couple of attachments, I believe there was, and there was a run the next morning and I had to pay that out.

Q. To whom did you pay that money?

A. I could not tell you at this moment unless I had the books, or something to go by. [26—9]

Q. You were attached on April 19th?

A. Somewhere around there, or there were to be attachments."

And at page 152 referring to his credit at the Bank of California, he further testified: "A. When



I used that credit it was my original intention to get rid of the Seaboard Bank as quick as I possibly could. The rate of interest was very excessive, and I felt that anyhow I could do better. When I got back to the shop it seems for some reason that I can't explain at this minute that there was an abundance of N. S. F. checks that Mr. Tyson of the Seaboard Bank had turned out, marked 'N. S. F.' That money that I had I intended to pay the Seaboard Bank that day. I was obliged to pay these checks and other things that were necessary to pay with that money, for the next day or so." (Page 112, Opposite Testimony).

Asked as to the immediate reason of his failure, he stated that it was an attachment on a Saturday afternoon, after banking hours, by the Seaboard Bank, which attached for \$9,280 the amount he was indebted to them, that they had not threatened to put the attachment on, that Mr. Tyson of the Seaboard Bank was complaining very bitterly that his bank balances were not very big, and was asking him to be more prompt in the payment of his paper. When asked the question, "What I want to know is this: Did he notify you to come to the bank, or did he send any other official or his attorney, and say to you "Now, here, Mr. White, pay that paper in one, or two, or three days, or we will attach you"? Was there anything like that? A. No, it is not. If he had, I would have gone to the Bank of California and got the money and paid him and got rid of him."

At page 140 of the Opposition Testimony, Mr. White further testified: "Q. What did you intend

doing with that \$10,000? [27—10] A. I originally intended to pay Mr. Tyson, and get rid of him, get rid of Mr. Tyson's bank, because I had gone into Mr. Moulton and told Mr. Moulton that the reason I wanted to change was to get rid of him, and nothing would give me more pleasure than to get out of Mr. Tyson's bank, but when I got back to the shop two other people came in there that I thought there would be no hurry about, because I could pay them whenever I liked, like a whole lot of other creditors, but they simply got me that day. I thought I was going to get rid of those dogs once and forever, and figured up how much it would take me to get rid of them, and I was going to use this money to pay them. Well, the first thing I knew the Seaboard National Bank rang up and said, 'Your acceptance given of Mr. Silverman of a certain date has become due yesterday, and yet we have not seen Mr. Silverman. Kindly come down here.' Then I suppose it didn't take fifteen minutes. It was after three o'clock, then when Mr. Hall rang up, and was talking to the girl and said? 'Blum has fallen down on his note.' I don't suppose Mr. Hall knew that Mr. Tyson had just rung up. Well, I was obliged to go down and straighten those matters up, and before I got through, \$8,500 of that money had just simply vanished, as those things had to be taken care of, but nearly all of it went to the Seaboard Bank on these acceptances and notes that people hadn't taken care of, which they generally did. Under the conditions of those acceptances, I would like to take care of that paper. If I didn't, it was directly charged back to



me, so I had to go to the bank and pay it. But at any rate, the paper had to be taken care of at maturity. I believe Mr. Shuey and Mr. Dorn had gone over it quite extensively [28—11] prior to Mr. Wight ever coming into the case. This money had practically all gone to the Seaboard Bank. At page 154, Opposition Testimony, when asked the question "Q. You went to the Bank of California, trying to get further loans? Why didn't you go to the Bank of California to get another loan when the Seaboard attached you? A. Well, I was not going to make a fool of myself. I had told the Bank of California that I was going to get rid of him to get rid of Tyson."

J. E. HALL.

Mr. J. E. Hall testified that he is assistant cashier in the Seaboard National Bank, that according to the books of the bank, Mr. White owed the Seaboard National Bank on December 31, 1912, \$14,071.65, and that on the said date Mr. White had on deposit in said bank \$561.25. In the cross-examination he testified that Mr. White was in the habit of discounting notes of other people at said bank, that when the bank advanced money on such notes they would charge Mr. White's account with the amount advanced, that Mr. White did not take the money with him it would be credited to his account, that when the note was paid, Mr. White's loan account was reduced just that much (page 23), that on December 31, 1912, the direct liability of Mr. White to the bank was \$5,375, that the balance charged to Mr. White was represented by notes discounted (page 27).



## IRVING F. MOULTON.

Mr. Irving F. Moulton testified in substance as follows:

That he is vice-president and cashier of the Bank of [29—12] California, and was cashier on December 31, 1912, (the date of bankrupt's financial statement, Ex. "A") and was vice-president and cashier on or about Apr. 19, 1913 (the date of the loan of \$10,000 by the bank to the bankrupt), that early in 1913 Mr. White applied to the bank for a loan of \$10,000 and gave his promissory note, that at the time of the making of the loan Mr. White furnished a financial statement, that at the time that Mr. White applied for the loan, he furnished Mr. White with the statement Ex. "A" to be filled out and Mr. White returned it and that Mr. White was then granted the loan, that the loan was not granted until after the statement was given (page 4), that Mr. White stated that Mrs. White owned some real estate, and that she would give a mortgage on it if the bank wanted it and that he replied that they would be satisfied if she would sign a guaranty and that she signed the guaranty, Ex. "C," that he could not state whether this guaranty was given prior or subsequent to the loan, "It must have been about the time; that the guaranty was not taken into consideration at the time the loan was made (page 6), that the loan was based upon Mr. White's statement. In the cross-examination he testified that it was a practice to consult with Mr. Anderson, president of the bank, before making loans to a new customer. Upon being shown the guaranty, which is in the sum of \$20,000,

the witness was positive that the limit of the credit extended to Mr. White was \$10,000 notwithstanding the amount mentioned in the guaranty, that he would not say that he was not to have more because he did loan him more afterwards (page 10). The witness further stated that he fixed the time when the statement was received in relation to the time the loan was made, not from his independent recollection [30—13] but from the ordinary course of business, the ordinary course of business the statement was received before the loan was granted. Upon his attention being called to the amount of liabilities in the statement, \$16,000, and asked if the liabilities had shown \$10,000 more, \$26,000, would he have made the loan, the witness replied that if he had the same opinion of Mr. White he would have granted it (page 12). He further stated that we like to have an inventory made as near as possible to the time when they got the statement, that the note, \$10,000, dated April 19, 1913, was later renewed, that he does not remember why it was renewed, on March 24, 1914, and on March 25th, the next day a further loan or \$1225 was made, that he had confidence in Mr. White, that the loans were for temporary purposes, something special, what it was he does not now remember, that he thinks he also at the time of making the loan of \$10,000 had a mercantile statement or report concerning Mr. White's financial condition. Mr. Moulton produced a commercial report, which is copied in the record at page 44, which was offered in evidence by attorney for the bankrupt. This report contains the following: October 3, 1913, stock on



hand at \$140,000, and in addition, between 10 thousand and 12 thousand dollars in good accounts receivable and small cash balance in bank and current indebtedness of about \$20,000. The report further states; October 3, 1912, "further investigation in claims of H. S. White to certain real estate in his statement of September 16th last, have been confirmed, an estimate of his worth in that report is believed to be reasonable, conservative and reliable, and it is felt that he can be safely rated not to exceed \$75,000 in tangible net resources and [31—14] good credit for current requirements. Mr. Moulton testified that had this report in his possession at the time the loan was made and stated that they must have read it at the time that they talked of the loan, that he could not state whether he got this report for themselves or from somebody else, but, that it is his recollection that he read the report, and Mr. Moulton on page 48 testified that upon the statement of his assets of \$147,000 and his *net* worth, \$131,000, that they would consider themselves justified in giving him a credit of \$20,000 on investigation, that Dun's report lent value to Mr. White's statement (page 49). At page 131-132, Mr. Moulton testified that when Mr. White's note fell due that the bank would renew the note and the method of renewing it was to have a new note made out and the old note would be paid by check against the new credit. New notes replacing prior notes were given on July 18, 1913, Oct. 18, 1913, January 20, 1914, and Apr. 20, 1914. Concerning these notes Mr. Moulton testified as follows:



“Q. Now, Mr. Moulton, you have just heard Mr. White’s testimony here as to his recollection of the method that those notes were renewed? A. Yes.

Q. From looking at these books and refreshing your recollection, or from what these books show, will you say that it was correct? He testified, Mr. Moulton, that his custom was to go in when those notes were due and execute a new note and then draw a check and pay the old note. Would you say that was correct, from looking at this transcript from your books? A. I would say that he was correct in regard to the physical part of it, but I don’t want you to understand that he borrowed \$10,000 so as to make it \$20,000. That would not be correct” (page 131-2). [32—15]

“Q. Would you say it was correct, so far as the form the transaction took, that he negotiated a new note and then drew a check and paid the old note? A. Of course, I can’t remember the exact words that he used in every particular case, because there are a good many a day, but whatever he said about the old note led me to believe that he was unable to pay his note, and that he would like to renew it, and the method of renewing it was to have a new note made out and give us a check for the other note” (page 132).

#### FRANK B. ANDERSON.

Mr. Frank B. Anderson testified that he is president of the Bank of California, that about April 19, 1913, Mr. Moulton brought Mr. White into his (Anderson’s) room, one of his duties is to sanction new loans of credit granted by the bank, Mr. White

complained of some treatment that he had received from another institution and stated that he wanted to get away from that institution and wanted to do business with the Bank of California. I went over Mr. White's figures with him and told Mr. Moulton that we could grant a line of credit. Witness then identified the figures in the financial statement "Trustee's Ex. A" being the figures referred to by him. At page 160 he stated that he did not remember the limit of the line of credit that was extended, that he remembered discussing with Mr. White the risky nature of the business that he was conducting and remembered that Mr. White offered some security, property that his wife held, or the fact that his wife held some property, that he remembered the relation of the figures in the statement which show a new worth of about \$130,000 or \$126,000 and that if Mr. White's statement [33—16] had a new worth of \$100,000 instead of \$130,000 he would have still made the loan. Referring to the financial statement the following testimony was given (page 162).

"Q. You actually remember, and you do not look back upon the thing and say, 'Now, that must be so, because I usually do it.' But you actually *remember made* that statement? A. I actually remember it, sir, because the thing impressed itself upon my mind. It was the first experience that I ever had outside, with the other institution. It shocked me; on account of the fact, secondly, that he was engaged in a business that was hazardous, and that everybody knows was hazardous." He further tes-



tified that to the best of his recollection the amount credited was \$10,000, he further testified as follows:

“Q. Mr. Anderson, do you remember Mr. White showing you a note to the Seaboard Bank for \$15,000? A. No.

Q. You don't remember it? A. No.

Q. Do you remember his showing you that note, and then showing you the back of it, and how it had been shaved \$300? A. No, I don't remember that.

Q. That it had been shaved? A. That it had been shaved. I don't remember it.

Q. You don't remember his showing you the note? A. No, the only things that have impressed themselves upon me in that transaction is the treatment that he said he had received from the institution, and the hazardous nature of his business.

Q. Do you remember this, Mr. Anderson: Do you remember Mr. White showing you that note and your asking Mr. White if Mr. Tyson was a personal friend of his, and Mr. White saying ‘Yes,’ and then you saying, ‘Did he loan you that [34—16a] much,’ looking at the \$15,000 note, and then saying to Mr. Moulton and Mr. White both, or to Mr. Moulton, ‘Well, if he can let him have \$15,000, I guess we can go him a little better; we can go him a little better?’

A. I never made such a statement. It is perfectly ridiculous to think of basing my judgment on what Mr. Tyson would do.”

It appears that on the day the bank granted the loan the bankrupt withdrew from the Bank of California, \$8,500. The testimony does not show the



items for which this money was disbursed, a portion of it was no doubt used to cover paper placed with the Seaboard Bank which had not been honored when due. The testimony of Mr. Hall shows that the bankrupt's direct indebtedness to the bank of December 31, 1912, was \$5,375, the total of indebtedness charged to him by the bank at that time was \$14,071.65, which would leave \$8,595.35 represented by paper charged to his account, for which paper upon being honored the bankrupt would be entitled to a credit.

What amount of paper was carried by the Seaboard Bank on April 19, 1913, the day of the loan, I am unable to ascertain from the record. The bankrupt upon the general examination stated that he intended to use the credit obtained from the bank to get rid of the Seaboard account, but, when he got back to his shop there was an abundance of "No Sufficient Fund" checks turned out by the Seaboard Bank, that he was obliged to pay these checks and other things, that were necessary to pay. He also states that on that day attachments were made or were going to be made.

The bankrupt seeks to give the impression that this condition of affairs was a surprise to him and that he [35—17] was prevented by such condition from using the money to pay the Seaboard's claim, according to his testimony, he did not consider he was indebted to the bank for the paper discounted until the paper had been dishonored. The statement that he intended to pay the bank's claim could only refer to his direct account with the bank.

It is incredible that threatened attachments and claims to the extent of \$8,500 came by surprise and first became known to him on the same day of the loan and immediately thereafter. The "N. S. F." checks and the attachments show that his affairs were very pressing at that time. I am satisfied that had the Bank of California extended him a credit of \$20,000 as claimed by him, he would have obtained from the bank the sum necessary to liquidate the Seaboard account, especially, as he represented to the bank that he desired to transfer his account from the Seaboard to the Bank of California. I refer to this testimony as it goes to the credibility of the witness. I also do not credit his testimony that the statement of his financial condition was not in the hands of the bank before the loan was made. It is my conclusion that the bankrupt's limit of credit with the Bank of California was \$10,000, and that the bank loaned him this sum relying upon the truthfulness of the written statement of the bankrupt's financial condition furnished to the bank by the bankrupt. (Marked "Trustee's Ex. A.")

As to the bills and accounts payable by the bankrupt on December 31, 1912, the record shows the following: By stipulation the following debts are admitted to have been owing by the bankrupt at that time: [36—18]

Sutro & Co.....	\$ 600.00
W. H. Stephens (Moulton Hill Vineyard) .....	500.00
Dr. Mascero .....	51.50
C. C. Moore & Co.....	92.50



George Roeth .....	3200.00	
H. Ravn .....	1500.00	
Thompson Bros. ....	57.28	
Baker & Hamilton.....	32.51	
Western Grain & Sugar Prod- ucts Co. ....	160.00	
W. E. Cashman.....	2950.00	
Weidenthal Gosliner Electric Co. ....	16.23	
Aitken & Aitken.....	50.00	
Pacific Tool & Supply Co.....	22.95	9232.97

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Counsel for the bankrupt also concedes as owing the account of Bloomberg Bros.....	3620.00	
There was also owing to the Sea- board Bank on direct account.	5375.00	
And to ——— Pantosky.....	6000.00	
And to Walter Linforth.....	2550.00	17545.00

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Making a total of	26777.97	
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All of the foregoing accounts I find were owing by the bankrupt on December 31, 1912. There are certain other accounts, to wit:

H. Blandies .....	\$ 500.00
—— Davison .....	2625.00
Oakland Bank of Savings.....	1000.00

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Total.....\$4125.00

As to the accounts the record shows the following testimony:



As to the paper discounted with the Seaboard National Bank he testified (page 117) that if he took paper or acceptances payable in 30 days or 60 days or 90 days for material he would receipt the bill and would take the paper to the bank and discount it to get the money and apply it to my loan.

“Q. As for as you were concerned, how did you consider the transaction? Do you understand the question?

A. I considered the transaction closed, until the party giving me the paper dishonored it. If he did, I would hear from it.

Q. And on December 31, 1912, it may well have been then that you owed the Seaboard a considerable amount for acceptances [37—19] that had not been paid?

A. I may have owed the \$50,000, if we take the discounts into consideration.

Q. Why didn't you, Mr. White, consider this as liabilities in your statement?

A. Well, I didn't consider them as assets, either.

Q. In other words, if I understand you correctly, you neither listed them as liabilities or as assets?

A. No, sir.”

As to the indebtedness to the Oakland Bank of Savings upon the \$1,000 joint note with his wife he testified that this note was Mrs. White's, that he signed it as security for Mr. Roth, and that he did not include this indebtedness in the statement to the bank because it was not his indebtedness. As to the indebtedness owing to Mr. Pantoskey, \$6,000, he testified that that was correct as to the \$6,000 it was not

included in the Bank of California, because they were to give Mr. Pantoskey a mortgage for that money which he subsequently got, that he had an agreement with Mr. Pantoskey that if he did not pay him within 48 hours or something similar to that, some very short time, on which I really expected to pay, we would give him a mortgage on this property that we had (page 114), that no debts which were secured by real estate were included in the statement to the Bank of California.

He denies owing to Mr. L. M. Davison \$3,000. He stated that he might have owed him a few dollars. (Pages 117-18.)

As to the claim of Mr. Linforth in the sum of \$3,000 less a credit item of \$950, which was not included in the statement to the bank, he stated that he had never received a bill from Mr. Linforth and that he did not know how much he owed to him or how much he owed any attorney [38-20] (page 118), that he had a great number of attorneys and that he had never received a bill from any of them with the exception of Mr. Cashman, that he did not figure any of his attorneys' claims because he never knew they were claims, for instance, what I remember that Frank Murphy had a bill against me for \$3,500, and it was settled by my giving him \$200 cash in hand. He told me he would take \$200 to square it up. I never figured in any liabilities as to attorneys' fees (page 119).

The claim of H. Blandies, \$500, has not yet been passed upon in the bankruptcy proceeding. The claim of Davison, \$2,625, was settled by the trustee



by paying to said creditor \$50. These claims together with the Oakland Bank of Savings, \$1,000, are not included in my findings as to the total of accounts payable as there is doubt as to the extent of these liabilities. Bills payable to the bank are given in the financial statement at \$10,900. The bankrupt testified to the effect that he thought this was a mistake and that such account included some bills payable, that he did not owe that amount to the banks at that time. The bankrupt probably should be held to the amount stated in his statement, \$10,900 as payable to the banks, however, I have given him the benefit of every doubt where the record does not satisfactorily explain the transaction. It is probable that he was indebted to the bank for paper which had not been honored, but if he is charged with this he should then be credited as an asset with the amount of the paper dishonored assuming that the paper would ultimately be paid. This cannot be ascertained from the record. [39—21]

#### JACOB PANTOSKEY.

Mr. Jacob Pantoskey testified that in the month of December, 1912, Mr. White was indebted to him in the sum of \$6,000 for money loaned, that the loan was made about the 3d day of December, 1912, that after the making of the loan, about 1914, there was a mortgage made to secure this loan, that the loan was evidenced by a note endorsed by the wife, that at the time the loan was made that there was no arrangement for the security of the note, that Mr. White owed him \$11,000 and that he had been paid



back \$5,000 (page 25), and that on December 31, 1912, Mr. White owed him \$6,000.

ROY B. BAKER.

Mr. Roy B. Baker testified that he is loan teller in the Oakland Bank of Savings and produced a note dated Feb. 7, 1912, for \$2,000, signed "Lena White, H. S. White" payable to the Oakland Bank of Savings, and stated that the sum of \$1,000 was owing said bank on December 31, 1912, upon said note (page 19), that he did not know whether Lena White borrowed the money and Mr. White signed as surety, or whether Mr. White and Lena White signed as surety, or whether both borrowed the money.

The bankrupt's explanation as to why the \$6,000 owing to Pantoskey was not included in the financial statement to the effect that he did not include debts for which real estate security was given, and that he had promised to secure Pantoskey by mortgage, which he afterwards did, is not satisfactory. The mortgage was not given until [40—22] 1914. Mr. Pantoskey directly contradicts the bankrupt that the mortgage was promised *as* the time the loan was made. The Pantoskey account was originally \$11,000. The bankrupt's statement that he expected to pay that back in 48 hours or give Pantoskey a mortgage, I do not credit, in view of Mr. Pantoskey's testimony and the fact that no mortgage was given until 1914.

Mr. Linforth's claim amounting to \$2,550 was a claim of such consequence that it is incredible that the bankrupt had no idea as to what he was owing

to Mr. Linforth. He should have ascertained it and placed it in his statement.

As to the stock in trade the record shows the following testimony:

The bankrupt testified that he arrived at the value of his stock by taking up stock, that such stock was taken up, some of it by actual weight, some of it by cost and some of it by value, that the price of second-hand machinery depends on all kinds of circumstances, upon the market, upon how quick new goods could be delivered, upon how bad a man needed the goods and how bad you wanted to sell them and how bad you needed the money (page 110). Asked as to how his stock in trade on hand on December 31, 1912, compared with the amount of stock on hand at the time of the bankruptcy, he answered, "There might have been a little bit more in 1912 than there was at the time of the bankruptcy, but that he didn't remember" (page 115).

It appeared that the bankrupt had certain litigations which terminated about 1908 and he testified (page 66, Gen. Tes.) that after the litigations he began to dispose of the stock, that after the litigation he had to begin again, [41—23] that the stock began to increase.

"Mr. SHUEY.—Q. What was the condition of your stock at the time of the ending of the litigation in 1908?

A. As to the quantity of the assets and the volume?

Q. Yes. Was it small or large at that time?

A. It was not as great as it was before the litigation, but I had yet quite a lot of stock.



Q. Was it smaller?

A. It was a little smaller; yes, sir.

Q. How does it compare with the stock on hand at the present time? Had it been getting smaller or larger?

A. I believe there is more stuff there now.

Q. I think your stock you testified the other day that you greatly increased in that line of business?

A. Yes.

Q. That was one of the troubles with the business?

A. Yes, there is more stuff there now then there was when we dissolved."

In the financial statement under the question—What is your usual date for taking inventories, the bankrupt inserted December 31. Concerning the taking of inventories the bankrupt upon his general examination testified as follows (page 22):

"Q. Did you take stock in your business personally yourself?

A. I would go over it casually. I would go over it about twice a year.

Q. What record did you keep of the stock?

A. It is the hardest thing to keep record.

Q. How did you take it?

A. We took a tab and taking the value, that is taking into consideration what it cost, what the probable return would be for it, then I struck an average, unless the stuff was absolutely valueless, and then I estimated the weight and put it down as scrap.

[42—24]

Q. Then would you figure out yourself as the value of the property?



A. The fair value of the property there, yes, sir."

As to the manner of taking inventories he has stated the same at page 60, Gen. Testimony. At page 177, he testified as follows:

"Q. How many times have you taken stock since 1908 when you dissolved partnership with Mr. Lauenstein?

A. Whenever a banker would call or Bradstreet's or Dun's.

Q. How long would it take you to take up stock?

A. I have explained it in a previous matter. I will repeat it again, that by reason of my being the only salesman in the place, the only one that knew the material, what stock I had, and knew the price, and so forth, it was a very hard matter. I would go out in the yard and take up stock on these glued tabs, and then I would be interrupted by somebody, and I would put that tab in my pocket until such time as I had a few moments leisure, and then I would go back again, and when I had four or five of those—I would keep them in the Burroughs adding machine, and I would have it right in front of me.

Mr. SHUEY.—Q. Did you take these inventories at regular intervals?

A. No, I had no special time, only when I had a partner."

Mr. William R. Pentz, trustee herein, testified that the amount realized from the sale of the property of the bankrupt's stock in trade was \$18,217.

SAMUEL COOPER.

(Page 92.)

Mr. Samuel Cooper testified that he was in the

second-hand machinery and pipe business for 14 years and knows [43—25] Mr. White and was acquainted with him on December 31, 1912, that he used to go in Mr. White's place of business and was familiar with the stock, and that he was able to place an approximate valuation upon such stock, and placed the same between the values of 30 and 35 thousand dollars. Upon cross-examination he stated that he could not read or write, that he has a partner that attends to the business, that they incorporated with \$75,000 and had the cash money to incorporate, that Mr. White's stock consisted at the time of second-hand machinery and it was lying like a pile of junk (page 94) that he was in Mr. White's place of business when the business failed, nearly a year ago and in every day pretty near, that he now has a bigger stock than Mr. White and that it is worth \$75,000. When asked how he estimated those figures 30-35 thousand dollars, he stated:

“Well, you see I go out and buy a pile of junk, even I buy from the Government, I buy it by the pile.

Q. You estimated Mr. White's material that way?

A. Yes, I estimated it that way. I buy stock that way. Most of the time I buy it by the lump.

Q. I see. And you estimated Mr. White's value of the stock by the lump?

A. I looked at it, and he used to brag what he estimated it at.

Q. To yourself? A. Yes, to myself.

Q. As junk?

A. I figured it as second hand, as junk.

Q. That is the way you figured it?



A. Well, we figured it all the time as junk" (page 96).

J. C. ERNSBERGER.

Mr. J. C. Ernsberger testified that his business is of the Lansing Company, of Lansing, Michigan, dealing in [44—26] machinery, wheelbarrows and warehouse trucks, and that he has met Mr. White and was in his former place of business (page 88), about December, 1912, possibly a half a dozen times, that he noticed the amount of stock he carried in a general way, that he has never been in the second-hand business, though he has been in the machinery business exclusively about nine years and estimated that the value of the stock in Mr. White's place of business as in December 31, 1912, at from 25 to 35 thousand dollars, that is, the general values of the second-hand machinery being, from one-third to one-half of the new; about the amount of machinery that would be contained in a building of the size as I remember that now, that the same quantity of machinery valued new would amount to about 80 or 100 thousand dollars.

JOHN JARDINE.

Mr. John Jardine testified *that has* been in the machinery business for about 24 years handling new and second-hand machinery and is familiar with the values of second-hand machinery, that he knows Mr. White, the bankrupt, very well; very favorable, and knew his place of business and was there during the years of 1912-13 occasionally, and was familiar in a general way with his stock in trade in December, 1912, that he was one of the



appraisers appointed by the referee herein to appraise the stock of the bankrupt, and that the stock in 1912 was practically the same line of stock (page 52); that in 1912-13, he was at the bankrupt's place of business 10 or 12 times probably, that he did not look over the whole stock, but knew practically what he had, that it would be [45—27] necessary to examine the whole stock to determine its value (page 54). Referring to the appraisalment of the property in the bankruptcy case, he stated that the appraisalment was made on a basis of his opinion as to what it would bring at a private sale in order to close out the stock within say 12 months. The appraised value of the stock on hand at the time of bankruptcy is \$30,143.95.

P. A. PEABODY.

Mr. P. A. Peabody testified that he is in the machinery business and has been engaged therein for twelve years, handling all kinds of machinery, that he has done adjusting for insurance companies on machinery losses, and that during most of the time he has handled second-hand machinery, that he was employed by the trustee of the estate of said bankrupt for disposing of the bankrupt's stock and was engaged in disposing of it about ten months, that he was not familiar with the business of the bankrupt prior to that time, but has been in the place of business in 1912, but does not know definitely about his stock in 1912, that as to the value of the stock of the bankrupt at the time of the bankruptcy, it was his opinion that if sold in the ordinary course of business, it would be worth at the very most, about

\$60,000, and that at the best possible market value of machinery of that class.

It is my deduction from the evidence that the stock carried by the bankrupt at the time of making the financial statement was about the same in quantity and value as on hand at the time of the bankruptcy. The evidence indicates [46—28] that it was less rather than more at the former time. The bankrupt's stock in bankruptcy proceedings was appraised at \$30,143.95 and sold for \$18,217.00. The stock was sold by the trustee mostly in small lots under an order authorizing him to conduct the bankrupt's business, and the sale covered a period of several months. It is my opinion from all the evidence in the case, that the value of the bankrupt's stock at the time of the making of said financial statement could not have exercised \$35,000, and I so find. The character of the stock is such that it is very difficult to place an exact valuation thereon, but the placing of a valuation of \$122,000, is grossly excessive and false.

### BOOKS.

As to the books kept by the bankrupt, the record shows the following:

On July 6, 1914, upon the bankrupt's general examination the bankrupt concerning books kept by him testified as follows (page 66):

“Q. What books did you keep in your business?

A. I didn't keep a very elaborate set. I never do when I am by myself.

The REFEREE.—Q. Just state what you kept.

A. I had a ledger, a sale sheet book which would



serve as a day-book, you might say, and that is about all, and the money that we paid on bills, why that was just as they came in, and we had money that we paid out."

Certain books of account turned over to the trustee were brought into court and shown to the bankrupt, who thereupon testified that there were other books which he kept which were not produced, that there were some 50 or over [47—29] of sale sheets books which were not produced, he also referred to a little receipt-book which was produced and said that this little receipt-book was about one of about a hundred, roughly speaking, for goods delivered and moneys turned over (pages 73-74) and at page 78 he testified that the other books referring to the sale sheets, amounted to a small size wagonload of them, that there were return check, book covers, stubs of checks, bill files innumerable and other miscellaneous bills, that he had a very large safe in his place of business which stood about 6 feet high that was full of books, that there was a vault in which he kept all the valuable metal and books that he had no particular box for and that were valuable enough not to destroy, that there was a regular office safe that was under lock and key in which he kept books and papers of value that he might wish to refer to any moment that was full of books, that the office safe did not keep all the books pertaining to his business, it was inadequate to carry them, that there was a flat top desk with drawers in it and a little roller-top desk arranged with drawers in which he kept notes and all the big busi-



ness which he did with the bank. "They were really of no value, but were kept for my own satisfaction and comfort, whenever I wanted to find something," that all bills payable would be in the form of bills on file and just as soon as they were removed from that file and placed on the paid file. "All those, they are missing here at the present time, paid and unpaid, that if he wanted to ascertain the amount of his liabilities he would just run it upon his adding machine from the bills payable. There was a book for labor expended in the form of a time-book, a number of [48—30] them, probable a hundred of them, that showed all the moneys paid out for labor. There was a book for horse feed and horse-shoeing, a number of them, in fact. There was books for all the outstanding jobs, for any particular job that we did, we would have one particular book for that particular job, whether we used one page or the whole book. Those are not in evidence. The books were kept by either one of the stenographers with my help Miss Knowland or Miss Wichman."

On his general examination the bankrupt further testified, page 99:

"Mr. DORN.—Q. Will your books show that money borrowed? A. From the Bloombergs?

Q. Yes. A. I don't think it will.

Q. Why won't it?

A. There is no books to show what I borrowed from the Seaboard or the International or anybody else.

Q. There is no book to show anything that you borrowed?

A. I don't think there is. That is part of the record.

Q. What is there that will show?

A. Documents in the office.

Q. Are there documents in the office that will show money borrowed from the Bloombergs?

A. I think there are.

Q. There are books in the office that show money borrowed from the Bloombergs?

A. All money appertaining to the business.

Q. I mean this particular transaction.

A. That as well as anything else.

Q. There are accounts relating to the Bloomberg business? A. Yes.

Q. Where are they? A. In the office. [49—31]

Q. Don't you know where they are in the office?

A. I don't know. Maybe they are in the safe. Maybe they are in the safe now.

Q. You had no regular place for keeping such things, had you?

A. Well, my safe. I had them in the safe, and when the safe got plumb full, I would keep them in the larger safe, when I would keep them in a drawer, but I was not very careful about them.

Q. In what part did you keep those records?

A. I kept the bills in the drawers and in these here canvas envelopes that double up."

LESTER HERRICK.

Mr. Herrick testified that he is a member of the firm of Lester, Herrick & Herrick, certified public



accountants. His qualification as an expert accountant was admitted by attorney for bankrupt. On page 85 Mr. Herrick testified that he could not find anything relative to a financial condition of H. S. White from the books he had examined and that he could not ascertain the total liabilities of H. S. White on December 31, 1912, nor the amount of money on hand or cash in bank on that date. On being shown the bankrupt's ledger he stated that it contains accounts of people to whom charges had been made and to whom credits were given, and contains no entries subsequent to October, 1912, and the witness further states that all books which had been marked for identification and which were fully examined by him disclosed nothing whatever as to when transactions of any character subsequent to October, 1912, with the exceptions of a small number of possibly half a dozen small check [50—32] books which showed transactions of deposits in bank, and evident withdrawals as indicated by the check stubs up into some date in 1914. They are not continuous and do not appear to be complete, that is, as to a record of all such transactions (page 87).

“Q. Do you find any reference in these books to any of your books which you have heard Mr. White relate are missing?

A. It is possible, and not improbable that these numbers showing as reference numbers in the ledger, refer to the foundation of the entry as being probably sales sheets of such a character as are in this book.” (The ledger contains entries subsequent to



October, 1912. The witness is mistaken as to said date.)

FREDA WICHMAN.

Freda Wichman testified that she was in the employ of Mr. H. S. White as stenographer and book-keeper and general office help about four or five months before his bankruptcy, that as far as she could remember there was a sales book, sales sheets, and when they were shipped out, the sales sheets were transferred to a little book and the sales were posted direct to the ledger, which is the ledger produced in court (page 98). As to whether there were other books there which the witness did not see upon the table in court she stated: "Not that I can remember. It is so long ago. I remember no other book with the exception of a petty cash-book."

Upon the cross-examination, upon being shown sales sheet "Ex. No. 1," and asked, "Now you didn't mean to say that these were the books, these particular books kept, but you mean to say that they were books like this? Am I correct? A. Yes.

Q. Books like this?

A. Yes, and that she didn't remember [51—33] how many of such sales books there were, that they had a bill spindle upon which the bills were placed.

Q. Did you make any entry of these bills in any book? A. No.

Q. When those bills on the spindle were paid, what was done with the receipt? I will ask you first, was a receipt taken when one of those bills was paid?

A. Yes.

Q. Then what was done with the receipt?

A. There was a receipt file somewhere, and they were filed away (page 102).

The testimony conclusively shows that the bankrupt's financial condition cannot be ascertained from the books and papers which he has produced and turned over to the trustee. The testimony of Miss Wichman, who was the bookkeeper for three months before the time of the filing of bankruptcy, indicated that with the exception of a cash-book all the current books kept by him were turned over to the trustee. Her testimony and also that of the bankrupt shows that the bookkeeping was done in a very careless manner. The bankrupt's statement of having a wagonload of books, which were not found by the trustee, I do not credit. What became of such books if they existed is unexplained. While the burden is upon the trustee to prove his charge, the bankrupt is not to be excused for failing to account for the absence of the books which he claims to have had immediately preceding the bankruptcy. The point as to whether the failure to keep books of account from which his financial condition could be ascertained was with intent to conceal his financial condition, is the only point to be determined on this question.

As to the construction to be given the section of the act in question, I desire to quote the following from a [52—34] recent case reported in *Advance Sheets of American Bankruptcy Reports*, of Nov., 1916, page 734, matter of Chass, U. S. District Court, Western District of Pennsylvania:



“Looking at the testimony in every light most favorably to the bankrupt, this court is unable to agree with the learned referee in his conclusions. The necessity of keeping books in a mercantile business such as that in which the bankrupt was engaged, must be apparent to everyone of intelligence. It must have been apparent to him because he had kept books in the business in which he had previously been engaged. The bankruptcy law itself contemplates that books should be kept by those who might benefit by its provision where such books were necessary factors in the conducting of business. Had it not been so, the failure to keep books would not have been expressed as a reason for refusing a discharge when coupled with an intent to conceal the merchant’s financial condition. It is apparent, too, that the ‘intent’ denounced by the present law is not intensified by the word ‘Fraudulent’ as it was in the act as originally passed. The reason for the omission of the word ‘fraudulent’ in the amendment to the act cannot be deemed as purposeless. The effect is to relieve the objecting creditors from the proof of fraudulent acts which disclose ‘fraudulent intent.’ As the act stands today, it is but necessary for the creditor to prove the failure of the bankrupt to keep books of account where such books of account were necessary and proper. And when satisfactory evidence of such fact is produced, the law determines the intent to have existed because the bankrupt must be presumed



to have intended to conceal his financial condition if such were the natural and probable consequences of his failure to keep books. Even in the criminal courts, where intent must be proved by the government, it is in many cases announced as a doctrine of the law that every man is presumed to have intended the natural and probable consequences of his act.

There is nothing in the testimony before the referee which must be held to be sufficient to rebut such presumption in the case at bar."

The interpretation given to the section of the act in question in this case is more strict than in any case with which I am familiar. Much leniency has been shown bankrupts in most of the reported cases, especially, where the bankrupt appeared to be an ignorant man, his business a small one, and he was able to satisfactorily explain his affairs. It may be that the correct ruling is as stated in the quotation, viz., that the intent should be inferred unless there is testimony sufficient to rebut [53—35] such presumption, as to the usefulness of the books kept by the bankrupt to enable the creditors to determine his financial condition, the bankrupt may as well have kept no books. In the present case the bankrupt is intelligent, shrewd and of plausible speech. He convinced the officers of the Bank of California that he was a man of trust-worthy character. His plausible and disingenuous testimony is more effective when heard than when read, but, it is unsatisfactory. In light of the disclosed condition of his affairs the characterization applied by the court to

the bankrupt's testimony in the case *In re Leslie*, 119 Fed. 410, is applicable here, viz.: "His statements are destitute of those elements which command confidence and justify judgment." He testified that there were no books to show the moneys he borrowed from the banks or anybody else, and claimed that he kept some notation thereof in his desk, but which was not among the papers found by the trustee and has not been produced. I cannot accept the conclusion that the bankrupt's failure to make entry in his books of these important transactions was without motive." It is my conclusion that the bankrupt, has, with the intent to conceal his financial condition, failed to keep books of account or record from which such condition might be ascertained. I will consider one further contention of counsel for the bankrupt because of the importance attached thereto in counsel's brief.

It appears that the first note given by Mr. White for the loan of \$10,000 April 19, 1913, fell due in 90 days. On July 18, 1913, he executed a new note to the bank of \$10,000 payable in 90 days and the bank placed \$10,000 to his credit upon the new note thereupon he drew his [54—36] check for \$10,000 with which he paid his old note and thus in the same manner new notes were given and the preceding note was retired. The last note, being the fifth note executed to the bank for \$10,000 was executed April 20, 1914, payable one day after date. The preceding note was retired by drawing his check in the amount of the old note with interest. On May 19, 1914, he was adjudged a bankrupt. Counsel for the bankrupt



contends that the extension of credit to the bankrupt must be taken as of the last date, April 20, 1914, for the reason that the previous obligations were paid by checks drawn by the bankrupt on the execution of each new note. The last note was about 16 months after the granting of the original loan, and counsel argues that the financial statement in question given some 16 months prior to the execution of the last note, was too remote to warrant a finding that the bank relied upon said financial statement when granting the bankrupt a credit upon his last note on April 20, 1914. Counsel cites several authorities to the point that a credit extended at a remote date from the giving of the financial statement justified the conclusion that the credit was extended without reliance upon such a statement. He also refers to the case of *In re Waite*, 223 Fed. 853, which case decided the converse of the proposition involved here. In that case as here discount of the new note and payment of the old were alike made without any actual currency changing hands. The false statement in that case was made upon the giving of the new note and the court held that the new note amounted to a new credit, and denied the discharge, and counsel argues therefrom that the credit from the Bank of California must be taken [55—36] as dating from the last note April 20, 1914, and that the financial statement given as of December 31, 1912, was too remote to be considered as a basis of the extension of such credit. I fully agree with the court in the case of *In re Waite* in holding the bankrupt to the form which they voluntarily gave to their



dealings with the bank. In form there was a payment of an old loan, the contracting of a new, and to induce the bank to grant them this extension of credit they gave a new financial statement at the time of the transaction, which was false; but it does not follow that the bankrupt cannot also be held to his original false statement given at the time the loan was first created. In the case at bar, a loan of \$10,000 made April 19, 1913, had not been repaid to the bank and it was the same obligation that was the subject matter of each of the five notes. The system of the bank in carrying this credit I deem entirely immaterial.

I find that the charges against the bankrupt have each and all been proven and recommend that his discharge be denied.

Dated December 28, 1916.

Respectfully submitted,  
ARMAND B. KREFT,  
Referee in Bankruptcy.

(The following pages contain a list of exhibits and papers transmitted.)

[Endorsed]: Filed Dec. 28, 1916, at 4 o'clock and 45 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [56—37]

(Title of Court and Cause.)

**(Order Disregarding Specifications of Objection to Discharge of Bankrupt and Order Granting Discharge.)**

WILDER WIGHT, Esq., Attorney for Bankrupt.

CLARENCE A. SHUEY, Esq., and W. DORN, Esq., Attorneys for Trustee.

The bankrupt regularly made application for his discharge. The trustee appeared and filed specifications in opposition thereto. The matter was then referred to the referee to hear and report on the objections. He has reported recommending that the objections be sustained the *the* discharge denied. Before the referee, and at all proper times the bankrupt has claimed that the specifications should not be considered, for the reason that the trustee was never authorized at a meeting of creditors called for that purpose to interpose objections to his discharge. The facts as gathered from the referee's report are as follows:

On April 27th, 1915, the referee sent out the following:

**“NOTICE TO CREDITORS.**

To the Creditors:

Take notice, that William R. Pentz, trustee herein has filed his Second Account, and that at the office of the undersigned, Room 202 U. S. Courthouse and Postoffice Building, San Francisco, California, on May 17th, 1915, at 10 A. M., said account will be examined and passed upon, and a dividend declared,

and further take notice that said trustee has filed herein [57] a petition for an order authorizing him to oppose the discharge of said bankrupt, which will be heard at the time and place aforesaid.

Dated April 27, 1915.

ARMAND B. KREFT,  
Referee in Bankruptcy."

It does not appear that any creditors attended in response to this notice, the referee's report reciting only as follows:

"At the time set for the hearing no creditor appeared in opposition to the making of the order authorizing the trustee to oppose discharge."

The trustee was not authorized by the creditors to oppose the discharge, but was authorized by order of the referee only. The power to authorize an opposition to a discharge is not lodged with the referee, but with the creditors,—“the parties in interest.” The language of the statute is “Provided, that a trustee shall not interpose objections to a bankrupt's discharge until he has been authorized so to do at a meeting of creditors called for that purpose.” This language has been held to mean “authorized *by the creditors* at a meeting held for that purpose.” If the creditors had met in pursuance to the above notice and had at such meeting authorized the trustee to oppose the bankrupt's discharge, I would not be disposed to hold such authorization unwarranted because of any defect in the form of the notice. But it is one thing to say that the trustee “is authorized by the creditors” and another thing to say as here that



no creditor appeared in opposition to the making of the order authorizing the trustee to oppose the discharge." I can find no warrant anywhere for the making of such order by the referee. As above stated it does not even [58] appear anywhere in the record that a single creditor was present at the time and place designated in the notice. All that does appear is that there was no creditor present objecting to the making of the order by the referee. In my judgment the appearance by the trustee in opposition to the bankrupt's discharge was absolutely without warrant, as wholly unwarranted as if he had appeared of his own motion and without an order of the referee having been made at all.

It is urged, however, that the provision of the statute above quoted is for the protection of the creditors and not for the protection of the bankrupt; that it is only a question of costs and not of authority. I do not so read the provision. The bankrupt is entitled to his discharge unless opposed by a party in interest. It is not every volunteer that may halt his discharge. The trustee is forbidden to oppose a discharge except when authorized so to do by the creditors. Until so authorized he is a mere volunteer, because not a party in interest. Any creditor may oppose a discharge, or the creditors acting together may authorize the trustee to do so. But unless the creditors either singly or collectively desire that a bankrupt's discharge be opposed, such discharge must be granted. Neither the trustee as such nor the referee as such is authorized to substitute his desire or judgment for the desire or judgment of the

creditors in this regard. And it is a very material matter to the bankrupt if to those authorized by statute to oppose his discharge shall be added by construction the trustee and the referee. So that he is materially interested in seeing that his discharge shall be opposed by those only [59] who are by statute authorized to do so. Even now, after extended hearings before the referee, and with elaborate briefs of counsel before me, I am unable to determine from the record that a single creditor is or ever was in favor of opposing the bankrupt's discharge.

The objections of the bankrupt to any hearing upon the specifications filed by the trustee, on the ground that they were unauthorized, were opportunely made, and should have been heeded. So far as appears there is no creditor interested in this proceeding, and for that reason the specifications will be disregarded, and the discharge granted.

January 23d, 1917.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jan. 23, 1917, at 5 o'clock P. M.  
W. B. Maling, Clerk. By Lyle S. Morris, Deputy  
Clerk. [60]

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(Title of Court and Cause.)

**(Order of Discharge.)**

WHEREAS, H. S. White, of the city and county of San Francisco in said District, has been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appears to have con-



formed to all the requirements of law in that behalf:

It is therefore ORDERED BY THIS COURT, that said H. S. White be DISCHARGED, from all debts and claims which are made provable by said acts against his estate, and which existed on the 4th day of May, A. D. 1914, on which day the petition for adjudication was filed against him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

WITNESS, the Honorable M. T. DOOLING, Judge of said District Court, and the seal thereof, this 23d day of January A. D. 1917.

W. B. MALING,  
Clerk.

By Lyle S. Morris,  
Deputy Clerk.

[Endorsed]: Filed, Jan. 23, 1917, at 6 o'clock P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [61]

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(Title of Court and Cause.)

**(Notice of Motion to Vacate Order Granting Petition  
for Discharge.)**

To H. S. WHITE, Bankrupt Herein, and to His Attorney, WILDER WIGHT, Esq.:

You and each of you will please take notice that the trustee in the above matter will, on the 3d day of February, 1917, at ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above court, Division No. 1 thereof,



at San Francisco, in the Northern District of California, move said Court for an order vacating the order of the said Court made herein on the 23d day of January, 1917, granting said bankrupt a discharge, and for a further order referring the matter to the referee for the purpose of certifying and finding as to the facts constituting the authority of the trustee to oppose said application for said discharge, and for the purpose of hearing and receiving any further proof that may be required in order that said referee may make such certification and finding relating to the authority of the trustee to oppose the discharge herein.

Said motion will be made upon the ground that the trustee was in fact duly authorized to oppose said discharge [62] and that any failure of the referee to make such certification and finding was due to inadvertence and excusable omission on his part.

Said motion will be based on the records of this court and of the referee, testimony taken, affidavit of Clarence A. Shuey hereto attached, and such other papers as have been considered by the Court or referee in this matter.

Dated January 27, 1917.

CLARENCE A. SHUEY,  
WINFIELD DORN,  
Attorneys for Trustee. [63]

(Title of Court and Cause.)

United States of America,  
Northern District of California,—ss.

**(Affidavit of Clarence A. Shuey in Support of Motion  
to Vacate Order Granting Discharge.)**

Clarence A. Shuey, being first duly sworn, deposes and says: That he and Winfield Dorn, his associate, have been at all times herein, and now are, the attorneys of record for the trustee in this matter.

That pursuant to the instructions of the creditors, the affairs of the bankrupt were thoroughly investigated by the trustee and by affiant and his associate as attorneys for the trustee. That after such investigations, creditors holding a majority in number of all claims in this estate expressed the desire to have the trustee take such steps on behalf of all the creditors as might be necessary to oppose any application made for a discharge by the bankrupt.

That owing to the large number of requests which the trustee and his attorneys received from creditors, the said trustee duly petitioned this Court for authorization to make opposition to the application for discharge filed by the bankrupt.

That thereafter, as appears from the records of this court, and the certificate of the referee on file [64] herein, notice was sent by the referee to all creditors of the estate entitled to notice that the trustee had filed said petition and that the same would be heard at the office of the referee, Room 202, U. S. Courthouse and Postoffice Building, San Francisco, California, on May 7, 1915, at ten A. M. That at said



meeting, at said time and place, a large number of creditors were present in person or by their respective attorneys in fact, to wit, creditors representing a majority in amount of all allowed claims, and, affiant verily believes, a majority in number of all allowed claims. That at said meeting the matter of the trustee's application for authorization to oppose said discharge was heard and considered by the creditors and all creditors present or represented at said meeting announced and declared themselves to be in favor of authorizing the trustee to oppose the said discharge. That thereupon the referee asked if there was any creditor present who objected to such authorization of the trustee, and no objection being made, and all creditors assenting thereto, the referee thereupon made an order expressly authorizing the trustee to oppose the said discharge.

Affiant further deposes that at the hearing before the referee of the opposition to the said discharge, and at the time that counsel for the bankrupt objected to the taking of testimony and the proceeding with the said hearing on the ground that the trustee was not legally authorized to oppose the said discharge, affiant stated that the trustee had been authorized at a meeting of the creditors as above set forth, which statement was confirmed by the referee.

That counsel for the bankrupt accepted said statement so made and confirmed without question, and, as affiant [65] understood and believes, as proof of the fact, and the proceeding continued without an attack being made upon said statement or proof.

That as will appear from the records in this case, no issue was raised by the answer to the specifica-



tions of opposition on the ground that the trustee was not legally authorized.

That affiant further deposes that he verily believed that the authorization to the trustee to oppose the discharge was given and conferred in the manner provided by law and established in the practice in bankruptcy.

CLARENCE A. SHUEY.

(Duly verified.) [66]

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(Title of Court and Cause.)

**Order Re Service of Notice of Motion to Vacate.**

It is hereby ORDERED that the time within which the foregoing notice of motion may be served is hereby shortened so that the notice given shall be at least five days before the day named for the hearing of said motion.

Dated January 27, 1917.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jan. 27, 1917, at 5 o'clock P. M.  
W. B. Maling, Clerk. By Lyle S. Morris, Deputy  
Clerk. [67]

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(Title of Court and Cause.)

**Affidavit of Winfield Dorn (in Support of Trustee's  
Motion to Vacate).**

State of California,  
City and County of San Francisco,—ss.

Winfield Dorn, being first duly sworn, deposes and says: That he is and at all times herein mentioned

has been, and now is, an attorney associated with Clarence A. Shuey as attorney for the trustee of the above estate; that affiant has been familiar with the administration of the above estate throughout and was present with his associate on May 7, 1915, at a meeting of creditors held pursuant to notice given by the referee and called for the purpose of hearing the second account of the trustee and the petition of the trustee for authority to oppose the application of the bankrupt for a discharge. That at said meeting, affiant, on behalf of certain creditors whom he represented and holding powers of attorney therefrom, announced and declared in favor of authorizing the trustee to oppose the application of the bankrupt for a discharge herein. That at said meeting, affiant's associate, after making a statement as to the [68] *restuls* of the investigations made by the trustee concerning reasonable grounds of opposition to the discharge and as to requests from creditors from whom he held powers of attorney, announced and declared in favor of authorizing the trustee to oppose the discharge. That at said meeting, certain other creditors in person or by attorney likewise announced and declared themselves in favor of authorizing the trustee to oppose such discharge. That thereupon the referee asked if there was any creditor present who objected to such authority to the trustee and no objection being made and all creditors assenting thereto, the referee thereupon made an order expressly authorizing the trustee to oppose said discharge.

That affiant was present before the referee on the



3d day of November, 1915, the day set for the first hearing before the referee of the application for a discharge. That affiant heard the objections made by counsel for the bankrupt to witnesses being called for the hearing on discharge and that at said time after counsel for the bankrupt had completed his objections, affiant's associate made a statement in reply in which he stated to counsel for bankrupt that as a matter of fact the creditors had authorized the trustee to oppose the discharge, which statement the referee confirmed.

That at no other meeting at which affiant was present was the point raised by counsel for the bankrupt that there had not been an authorization of the trustee if the meeting itself was in fact legally noticed and called. That according to affiant's best knowledge, information and belief, the position taken by counsel for the bankrupt went to the objection that the notice was insufficient and, therefore, no matter whether all the creditors were present or not and no matter whether [69] all the creditors present voted unanimously in favor of the objection to a discharge, that nevertheless on account of the meeting not being called by a notice sufficient in form the creditors had not, in fact, authorized the trustee to oppose the discharge.

WINFIELD DORN.

(Duly verified.)

[Endorsed]: Filed Feb. 3, 1917, at 10 o'clock A. M.  
W. B. Maling, Clerk. By Lyle S. Morris, Deputy  
Clerk. [70]



(Title of Court and Cause.)

**Trustee's Petition for a Rehearing on Opposition to  
a Discharge.**

**STATEMENT.**

In this case, if the bankrupt had raised the question as to whether the trustee had been duly authorized to oppose the discharge and as to whether the specifications were sufficient before this Court referred the matter to the referee for the taking of testimony, a great deal of time and trouble would have been saved and the matter would be properly before this Court now for determination on the merits. Instead of so doing, however, as will appear from the affidavit hereto attached, counsel for the bankrupt waited until the day set for hearing before the referee when the trustee had his witnesses present and then made certain objections which are attached to the referee's certificate. These objections did not question that actual authority was given by the creditors to oppose the discharge except that whatever actual authority was given by the creditors was a nullity because the meeting had not been duly called. The matter was argued before [71] the referee. Counsel for the bankrupt was advised that actual authority had been given by the creditors to the trustee. Counsel for the trustee presented their side to the referee and stated that if in the referee's opinion there was any question as to the authority of the trustee to oppose the discharge or as to the sufficiency of the specifications that they desired that the case be certified back to the court so that they

might ask leave to correct the same. Authorities were presented; the matter was taken under advisement, and the case continued. Thereafter, the referee at the next hearing ruled that the notice and specifications were sufficient and directed counsel to proceed with the hearing. As no issues were raised by the pleadings covering these objections which have been overruled, and as the actual authority from the creditors was not questioned, but from the attitude of counsel, conceded, no evidence was offered on this point, the theory of the trustee being that under the objections raised by the bankrupt which did not dispute actual authority, no evidence was necessary to establish the same, and, therefore, no finding by the referee was made as to the authority of the trustee, except as to the sufficiency of the notice. The referee did, in his certificate, state that "at the time set for the hearing, no creditor appeared in opposition to make the order authorizing the trustee to oppose the discharge," but from an examination of the certificate it will appear that this was inserted as an explanation for the ruling by the referee of his view of the law that the bankrupt [72] was not a party who could be heard at a meeting of creditors where the question as to whether the trustee should be authorized to oppose an application for a discharge is to be considered.

Therefore, the referee's certificate before this Court is insufficient to show the actual facts relating to the authority given to the trustee by the creditors to oppose the discharge, and we must earnestly urge that under the law, a rehearing should be granted



and the matter rereferred to the referee so that the trustee may be permitted to offer proof of the actual authority givn by the creditors to the trustee and then to amend the specifications to conform to the proof, if, in the opinion of the Court, the same are insufficient.

## LAW.

### I.

This Court has authority to set aside its order and permit a rehearing.

“For the exercise of this jurisdiction they are (bankruptcy courts) considered as always open and as having no separate terms, and a case in bankruptcy is one continuous proceeding from its inception to the closing of the estate and discharge of the trustee. Therefore, any order, decision, or decree made in the progress of such a cause remains subject to the control of the Court until the final close of the case, and, saving only vested rights which may have accrued under it, may be corrected if found to be erroneous, modified to suit the facts or vacated and set aside, without regard to the fact that one or more of the periods appointed for the stated terms of the court may have elapsed.”

Section 25, Black on Bankruptcy, citing a large number of cases, notably *Sandusky vs. Bank*, 23 Wall. 289; 23 Lawyers Ed. 155.

“And an application for the re-examination of an order or decree in bankruptcy may be made by motion or petition, according to the circumstances of the case.”



## Section 25, Black on Bankruptcy. [73]

“The discharge decree may be vacated on other grounds also . . . , but such vacating, merely puts the discharge petition back for a rehearing and is different from the revocation of the discharge.”

Remington, Section 2818, page 1649, Vol. 2.

## II.

The policy of the law in reference to a discharge in bankruptcy is to have the same determined upon the merits.

“It is admitted by counsel that the specifications are not in proper form and leave is asked to amend them. Objection is made that there is nothing by which to amend, the specifications being so entirely defective. There was an old doctrine that amendments could be made only where a good cause of action was defectively stated, but in modern practice, and especially under our liberal federal statutes of amendments, an entirely new cause of action may be stated in a pleading by way of amendment and there are some very radical and startling rules to that effect. Some decisions are against this, particularly where the bar of the statute of limitations is involved or some like effect is the result of allowing the substitution of the new ground of action. Still the modern rule is that of great liberality in quite all cases and it seems to me that if a bankrupt has been guilty of any of the offenses for which his discharge may be opposed the most liberal rule of

amendment of specifications should prevail and that he should not be allowed to escape by the failure of the creditors to properly plead the grounds of opposition. The ordinary discretion of the Court will protect the bankrupt against any injustice in the application of this liberality of amendment; his privilege of discharge from his debts is purely a matter of statutory grace and not of any common right at all and he should expect always to be denied discharge unless he complies strictly with the conditions entitling him to that indulgence by refraining from any wrongdoing denounced by the statute as a bar to his discharge. Here the specifications indicate that if the facts be properly pleaded there may be a bar, not certainly so, and it may in the end turn out to be only a fraud upon creditors not made a ground for opposing the discharge, but it may be otherwise, and the averments are not so entirely destitute of all merit as to invoke even the old rule of amendment relied on by the bankrupt's counsel." [74]

The Court then cites a large number of cases and says:

"The practice as to amendments under the existing bankruptcy statute of 1898 is just as liberal as under the former act and in other courts. . . . The bankruptcy statute being very liberal to the debtor in the matter of his discharge, confining the grounds of opposition to conduct on his part of a criminal nature of



*quasi*-criminal carelessness and negligence, he should not be allowed to receive the acquittance of the statute because of any embarrassment or obstruction encountered by his creditors in presenting their opposition to his application for it. Only negligence of a culpable character on their part should debar them from the benefit of Revised Statutes, Section 954, as to the amendment of their specifications, and these, it seems to me, are the considerations which should control the Court in the exercise of its discretion in the premises.”

In re Glass, 119 Fed. 509.

Therefore, the trustee having been actually authorized by the creditors in accordance with the law to oppose the discharge herein, and the referee having decided as a matter of fact, after hearing and carefully considering the testimony offered in this matter, that the objections made by the trustee should be sustained, it is the policy of the law, as laid down by the above case (which is a leading case, cited in a great many other cases) that a rehearing should be granted in this matter so that any technical defects of the record before this Court may be corrected in order that this Court may determine the matter upon the merits.

### III.

There is an exception to the general rule that ignorance of the materiality of a fact not offered as proof is not ground for a rehearing or new trial.

While the general rule of law is that ignorance of the materiality of a fact not offered as proof is



not a ground for a rehearing or new trial, yet there is an exception where counsel are reasonably led by opposing [75] counsel to try their case upon a theory which would dispense with the necessity of proving certain facts when, if they had not been so led, they would have offered evidence to establish the same. In other words, when counsel for the bankrupt in their pleadings and at the commencement of the hearing before the referee, made objections to the matter proceeding, copy of which is attached to the certificate of the referee, and throughout the trial made no contention that the actual authority of the trustee was questioned, leading the court and counsel for the trustee to believe that this fact was conceded, then the trustee should be permitted under the law to have a rehearing in order to offer this evidence of actual authority which is considered under the authorities as newly discovered evidence, even though the materiality alone can be truly said to be newly discovered.

In reference to newly discovered evidence for our motion for new trial:

“It is noted that there is in the language of the opinion first above reciting a reference to exception in the case of surprise. This exception is founded on the doctrine that where the cause is tried upon the theory that could not have been reasonably anticipated, it is surprise authorizing a new trial; and, if the moving party is thereby placed in such a situation that he cannot fully avail himself of evidence that would otherwise have been at his command he

would be entitled to a new trial upon the additional ground of newly discovered evidence, even though the materiality alone can be truly said to be newly discovered. To this extent, there is an exception to the rule that a party is bound or presumed to know the materiality of the evidence in support of his case.”

Section 89, Hayne’s New Trial and Appeal,  
Revised Edition, Vol. 1, page 414. [76]

#### IV.

The referee is an arm of this court, sitting in its aid as a master.

“The opinion and order granting a discharge was entered herein on June 12, 1902. Motion for rehearing was made on June 18, 1902. The ground of it is that the referee exceeded his jurisdiction in reporting to the court that the objections of the creditors to the discharge are not sustained by the evidence taken by him. The order of reference directs him to report the facts, with the evidence taken, to the court, together with his findings as to the same.

“The application for discharge must, by section 14 of the Bankrupt Law, and General Order in Bankruptcy No. 12, Section 3, be heard and decided by the judge of the court. The referee has no jurisdiction to determine the question, but the court may refer the case to him generally for a report. He aids the court like a master in chancery. He cannot finally determine the question of discharge or nondischarge, but he may be ordered to report the facts and his recommenda-



tion or conclusion as to the matter. This is merely to aid the judge, and the court then determines the matter. The practice in bankruptcy is much like that in equity, and it is hardly supposable that the law-making power intended that a court, if it saw proper, should not avail itself of such aid. (In re Kaiser, 2 Am. B. R., 767, 99 Fed. 689.”

In re Rauchenplat, Vol. 9, A. B. R., 763.

If this whole matter had been heard before the above court, the question as to the authority of the trustee and the sufficiency of the pleading would have been passed upon and defects, if any, as to the record, would have been corrected, and then the case would have proceeded to final determination upon the merits. Therefore, the referee, sitting as a master of the court, if it shall appear to this court that the referee has made any erroneous ruling as to the law, or has omitted to find, through inadvertence, as to any material facts which were conceded as true upon the hearing, this court should attempt to correct the same so that the matter may be determined as if the whole case had been heard before it. In other words, in this case, through the actions of counsel for the bankrupt, the trustee was led to believe that the fact that the trustee had been actually authorized to oppose the discharge was conceded. [77]

Furthermore, by such action upon the part of counsel for the bankrupt, the referee, assuming that the actual authority was conceded, but believing that the same was not material upon the hearing before him on account of the fact that the bankrupt had, in



his answer, made no point of the lack of authority, overruled the objections made by counsel for the bankrupt and ordered counsel for trustee to proceed.

Therefore, according to the authorities hereinbefore referred to, counsel for the trustee again must earnestly urge that a rehearing should be granted and the matter re-referred to the referee so that the trustee may be permitted to offer proof of the actual authority granted by the creditors to the trustee and then to amend the specifications to conform to the proof if, in the opinion of the Court, same are insufficient.

Respectfully submitted,

CLARENCE A. SHUEY,  
WINFIELD DORN,  
Attorneys for Trustee. [78]

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(Title of Court and Cause. )

**(Affidavit of Clarence A. Shuey in Support of  
Petition for Rehearing.)**

United States of America,  
Northern District of California,—ss.

Clarence A. Shuey, being first duly sworn, deposes and says: That he and Winfield Dorn, his associate, have been at all times herein, and now are, the attorneys of record for the trustee in this matter.

That pursuant to the instructions of the creditors, the affairs of the bankrupt were thoroughly investigated by the trustee and by affiant and his associate as attorneys for the trustee. That after such investigations, creditors holding a majority in amount of

all claims in this estate expressed the desire to have the trustee take such steps on behalf of all the creditors as might be necessary to oppose any application made for a discharge by the bankrupt.

That owing to the large number of requests which the trustee and his attorneys received from creditors, the said trustee duly petitioned this Court for authorization to make opposition to the application for discharge filed by the bankrupt.

That thereafter, as appears from the records of this court, and the certificate of the referee on file [79] herein, notice was sent by the referee to all creditors of the estate entitled to notice that the trustee had filed said petition and that the same would be heard at the office of the referee, Room 202, U. S. Courthouse and Postoffice Building, San Francisco, California, on May 7, 1915, at ten A. M. That at said meeting, at said time and place, a large number of creditors were present in person or by their representative attorneys in fact, to wit, creditors representing a majority in amount of all allowed claims, and affiant verily believes, a majority in number of all allowed claims. That at said meeting the matter of the trustee's application for authorization to oppose said discharge was heard and considered by the creditors and all creditors present or represented at said meeting announced and declared themselves to be in favor of authorizing the trustee to oppose the said discharge. That thereupon the referee asked if there was any creditor present who objected to such authorization of the trustee, and no objection being made, and all creditors assenting thereto, the



referee thereupon made an order expressly authorizing the trustee to oppose the said discharge.

Affiant further deposes that at the hearing before the referee of the opposition to the said discharge, when the trustee had his witnesses present, ready to proceed, and at the time that counsel for the bankrupt objected to the taking of testimony and the proceeding with the said hearing on the ground that the trustee was not legally authorized to oppose the said discharge, affiant stated that the trustee had been authorized at a meeting of the creditors as above set forth, which statement was confirmed by the referee. [80]

That counsel for the bankrupt accepted said statement so made and confirmed without question, and, as affiant understood and believes, as proof of the fact, and the proceeding continued without an attack being made upon said statement or proof.

That as will appear from the records in this case, no issue was raised by the answer to the specifications of opposition on the ground that the trustee was not legally authorized.

That affiant further deposes that he verily believes that the authorization to the trustee to oppose the discharge was given and conferred in the manner provided by law and established by the practice in bankruptcy.

CLARENCE A. SHUEY.

(Duly verified.)

[Endorsed]: Filed Feb. 2, 1917, at 9 o'clock and 20 min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [81]



(Title of Court and Cause.)

**(Affidavit of Wilder Wight in Opposition to  
Trustee's Motion to Vacate.)**

Comes now the above-named bankrupt, and without admitting the right of the above-named trustee in bankruptcy to make a motion to vacate the judgment of discharge herein, and without waiver of any kind, files this affidavit.

WILDER WIGHT,  
Attorney for Bankrupt. [82]

State of California,  
Northern District of California,—ss.

Wilder Wight, being first duly sworn, deposes and says: That affiant is an attorney at law and attorney for H. S. White, the above-named bankrupt, and since the 3d day of November, 1915, has represented said bankrupt in all matters pertaining to the opposition of his discharge, and has attended all hearings before the Special Master and Court in connection therewith.

That said matter was first set for hearing before the Honorable Armand B. Kreft as Special Master on the 3d day of November, 1915. That on said day affiant made objection to witnesses being called, testimony being taken, or to any hearing of said matter, on the ground, among others, that the specifications of objection did not state that the trustee of said bankrupt was authorized to oppose the discharge of said bankrupt by the creditors of said bankrupt in a meeting duly convened, and affiant argued this ob-

jection at length before said Special Master, most of said argument being devoted to the point that not only were the specifications of objection fatally defective for the reason that they contained no allegation that the trustee was authorized to oppose the bankrupt's discharge by a meeting of the creditors called for that purpose, but also that the records in this case showed no such authority, and further that no such authority existed in fact. The Special Master did not pass upon said objection at that time, but continued the matter to November 11th, 1915. Shortly thereafter, but before the next hearing, your affiant submitted to said Special Master and served upon counsel for the trustee a brief in support of his objection, eighteen pages of which were devoted to the point that not only was it not so alleged in the specifications of objection, but also that the records in this case did not show that the trustee herein had been authorized to oppose the bankrupt's discharge by the creditors of the bankrupt in [83] or at any meeting, and that such authority did not in fact exist. So that counsel for the trustee were fully apprised of the nature of the objection made, and as there were thereafter extended hearings before the Special Master at which evidence was received, counsel had ample opportunity to meet this objection and to prove that the trustee was authorized by the creditors to oppose the discharge herein if such authority in fact existed.

That on the 11th day of November, 1915, the Special Master made decision overruling said objection, and the matter was continued to the 24th day



of November, 1915, for the purpose of taking testimony. That on said 11th day of November, 1915, and after said objection had been overruled, the order of continuance made and the hearing concluded, affiant discussed with the said Special Master, informally, his decision. It was at the end of this informal discussion that the Special Master remarked to your affiant that, "Mr. Shuey and Mr. Dorn represent certain creditors." Neither Mr. Clarence A. Shuey nor Mr. Winfield Dorn said anything in this behalf to your affiant, and your affiant said nothing in this behalf to either Mr. Shuey or Mr. Dorn, and furthermore, your affiant made no reply to the Special Master.

That neither of the counsel for the trustee in bankruptcy herein stated or claimed, then, or at any other time, to your affiant, either at any of the subsequent hearings of said matter, or in any conversations, or in any of their briefs, four of which they filed, that the matter of the trustee's application for authorization to oppose said discharge was heard and considered by the creditors and all creditors present or represented at the claimed meeting of creditors on May 7th, 1915, announced or declared themselves to be in favor of authorizing the trustee to oppose the said discharge, nor has either counsel made any statement or claim to your affiant indicating in any way that there was any action taken by the creditors at any meeting authorizing the trustee to oppose this discharge, [84] nor has either counsel for the trustee ever asked affiant to accept any such statement as proof of any such fact, nor has your affiant



either by word or act ever given to either of counsel for the trustee herein any reason whatsoever to believe that your affiant considered any authorization of the trustee herein by the creditors to oppose the discharge of the bankrupt as proved or that such authority existed in fact, and your affiant has always claimed that such authority of the trustee by the creditors did not exist in fact; and your affiant verily believes that the trustee herein was not authorized by the creditors at a meeting called for that purpose, to oppose the discharge of this bankrupt, for the reason that the records in this case contain no record or statement of any kind as to any meeting of the creditors of this bankrupt on the 7th day of May, 1915, nor of any vote or authorization of the trustee by the creditors thereat; and affiant verily believes that if there had been a meeting of creditors or any action taken at such meeting that there would have been a record of the same, for the reason that whenever there has been a meeting of the creditors in this case, the records so state, and there is also a record of the proceedings had and of the vote taken, and the records in other cases indicate that it is the invariable practice that when there is a meeting of the creditors, to so state, and if there is a vote, a record of the vote; that throughout this whole proceeding whenever counsel for the trustee have asked affiant to admit a fact, they have required of him a written stipulation, unless in open court with the court reporter present.

That sometime during the month of December, 1915, when affiant had occasion to visit Mr. Shuey to examine his copy of the testimony of the bankrupt

taken on his general examination, Mr. Shuey remarked to affiant, in discussing this case, that he was satisfied that the [85] authorization to the trustee by the referee in this case was legally sufficient and proper, because he had examined a number of the records in the office of the referee in bankruptcy, and that it had always been done that way. That on December 30th, 1916, when affiant had occasion to be present in Court for the purpose of having continued the hearing of the report of the Special Master in this case, affiant asked Mr. Shuey if he had any objection to affiant's filing a brief in this matter, to which Mr. Shuey consented, and he then said to affiant, "You know that you are foreclosed as to all matters of fact; on those the report of the referee is final, and I am not afraid of the law."

That the most that counsel for the trustee herein has ever claimed is that there was authority conferred upon the trustee by the referee at a creditor's meeting, and affiant does not recall that even this claim was made until counsel filed his brief in reply to affiant's after the Special Master had rendered his report, the claim of counsel theretofore always having been that an authority conferred upon the trustee by the referee was sufficient, and until he filed his affidavit in support of this motion to vacate the judgment of discharge herein, counsel has never claimed nor intimated in any way at any of the hearings before the Special Master, nor in any conversations with your affiant, nor in any of his briefs, of which he filed four, that there was any authority conferred upon the trustee in bankruptcy by the creditors of the



bankrupt to oppose the discharge of the above named bankrupt.

And further your affiant saith not.

WILDER WIGHT.

(Duly verified.)

[Endorsed]: Filed Feb. 2, 1917, at 9 o'clock and 30 min. A. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [86]

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(Title of Court and Cause.)

**Opinion and Order Denying Petition for Rehearing  
and Motion to Set Aside the Discharge.**

WILDER WIGHT, Esq., Attorney for Bankrupt.

CLARENCE A. SHUEY, Esq. *Esq.*, and W. DORN, Esq., Attorneys for Trustee.

On an application made to the Court by the bankrupt for a discharge, the trustee appeared and filed specifications in opposition thereto, and the matter was referred for hearing to the referee. The referee reported, and recommended that a discharge be denied. A hearing was thereafter had before the Court upon this report, and the Court ordered the discharge of the bankrupt notwithstanding the adverse report of the referee for the reason that it nowhere appeared that the trustee was authorized to interpose objections at a meeting of creditors called for that purpose as required by Section 14 of the Bankruptcy Act. The trustee now moves that the discharge be set aside and the matter referred again to the referee, and bases the motion upon the ground that the



trustee was in fact authorized by the creditors to oppose the discharge, although the record as brought here shows that whatever authorization the trustee had was by order of the referee. The motion to set aside the discharge is opposed by the bankrupt, who contends that every opportunity was afforded the trustee to make proof of the fact that he was authorized by the creditors to oppose [87] the discharge, if such were the fact, and insists, as he has at all times insisted that the specifications do not show any authorization at all, while the notice of appearance filed by the trustee contains the recital "the trustee having been first duly authorized by the above Court to interpose objections to the bankrupt's discharge."

A re-examination of the lengthy record and of the voluminous briefs fails to disclose a single suggestion prior to the present motion, that the trustee was authorized to make opposition by any one except "by order of the Court" or by "order of the referee" which I take to mean the same thing. The trustee was not taken by surprise, for the bankrupt urged from the beginning the insufficiency of the specifications, and the lack of authorization, and I see no reason, in view of the conflicting affidavits now represented, for disturbing the conclusions heretofore reached.

The petition for a rehearing, and the motion to set aside the discharge are denied.

February 8, 1917.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Feb. 8, 1917, at 5 o'clock and 15 Min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [88]

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(Title of Court and Cause.)

**Petition for Appeal by Trustee in Bankruptcy and  
Order Allowing Appeal.**

Now comes William R. Pentz, the trustee of of the above estate, considering himself aggrieved by the judgment of the above Court made herein granting to said bankrupt a discharge, and, within the time required by law, does hereby appeal from the said judgment to the United States Circuit of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 16, 1917.

CLARENCE A. SHUEY,  
WINFIELD DORN,

Attorneys for William R. Pentz, Trustee in Bankruptcy of H. S. White, Doing Business Under the Name of H. S. White Machinery Company.

The foregoing appeal is allowed.

Dated February 16, 1917.

M. T. DOOLING,  
District Judge.

[Endorsed]: Filed Feb. 16, 1917, at 11 o'clock A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [89]



(Title of Court and Cause.)

**Assignment of Errors.**

And now on this 16th day of February, 1917, comes William R. Pentz, the trustee in bankruptcy of the estate of H. S. White, doing business under the name of H. S. White Machinery Company, through his attorneys, Winfield Dorn, Esquire, and Clarence A. Shuey, Esquire, and says:

That the judgment of the above-entitled court made and entered herein disregarding the recommendations of A. B. Kreft, Esquire, referee in bankruptcy of said court, and reversing certain rulings of said referee and granting to the bankrupt a discharge, is erroneous and against the just rights of the said trustee in bankruptcy for the following reasons:

1. That the Court erred in disregarding the recommendations of the referee that a discharge be denied to the bankrupt herein.

2. That the Court erred in holding that a discharge be granted herein. [90]

3. That the Court erred in holding that the trustee was not authorized by the creditors to oppose the discharge.

4. That the Court erred in not affirming certain rulings made by the referee holding that the trustee was duly authorized by the creditors to oppose the discharge.

5. That the Court erred in holding that it was necessary for the trustee to prove in these proceed-



ings that he had been authorized to oppose the discharge.

6. That the Court erred in holding that the order of the referee made on the 7th day of May, 1915, authorizing the trustee to oppose the discharge herein was not conclusive evidence of sufficient authority.

7. That the Court erred in holding that the order of the referee made on the 7th day of May, 1915, authorizing the trustee to oppose the discharge herein was not *prima facie* evidence of sufficient authority.

8. That the Court erred in holding that a trustee in bankruptcy is not a party in interest in opposing the application for a discharge by the bankrupt.

9. That the Court erred in holding that Section 14b (6) of the Bankruptcy Act of 1898 as amended is not a provision solely intended for the protection of creditors.

10. That the Court erred in reversing the ruling of the referee holding that Section 14b (6) of the Bankruptcy Act of 1898, as amended, is a provision solely intended for the protection of creditors.

11. That the Court erred in holding that a bankrupt can question the authority of a trustee to oppose the bankrupt's application for a discharge. [91]

12. That the Court erred in holding that the bankrupt can question the authority of the trustee to oppose the discharge after he has been so authorized by an order of Court duly made at a meeting of creditors called for that purpose.

13. That the Court erred in holding that it was unnecessary for the bankrupt to establish affirma-

tively that the trustee had not been duly authorized to oppose the discharge.

14. That the Court erred in holding that the bankrupt did not waive all objections to the authority of the trustee to oppose the discharge herein.

15. That the Court erred in holding that the issue of authority to the trustee was not waived by the pleadings and proceedings herein.

16. That the Court erred in holding that the trustee was obliged to offer proof and the referee to find upon an issue not raised by the pleadings.

17. That the Court erred in denying the motion of the trustee for an order vacating the order granting a discharge and for a further order re-referring the matter to the referee for the purpose of certifying and finding as to the facts constituting the authority of the trustee to oppose the discharge.

18. That the Court erred in denying the trustee's petition for a rehearing in order to permit him to establish affirmatively by proof that the trustee had, in fact, been duly authorized by the creditors at a meeting called for that purpose to oppose the discharge.

19. That the Court erred in denying the trustee the right to amend the specifications to conform to the actual [92] facts with reference to the authorization of the trustee by the creditors to oppose the discharge.

20. That the Court erred in denying the trustee's petition for a rehearing and re-reference to the referee so that the trustee might be permitted to offer proof of the actual authority granted by the credi-



tors to the trustee and then to amend the specifications to conform to the said proof.

21. That said judgment was contrary to the law and the facts herein.

WHEREFORE, the said William R. Pentz, as such trustee, prays that said judgment of the District Court may be reversed.

CLARENCE A. SHUEY,  
WINFIELD DORN,

Attorneys for William R. Pentz, Trustee in Bankruptcy of H. S. White, Doing Business Under the Name of H. S. White Machinery Company.

[Endorsed]: Filed Feb. 16, 1917, at 11 o'clock A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [93]

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(Title of Court and Cause.)

**Citation on Appeal (Copy).**

United States of America,  
Ninth Circuit,—ss.

To H. S. White, Doing Business Under the Name of  
H. S. White Machinery Company, Bankrupt:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city and County of San Francisco in said District on the 17th day of March, 1917, next, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the Northern District of California, First Division, in the above-entitled



matter, to show cause, of any there be, why the judgment of the said District Court rendered in said matter and made and entered herein granting to said bankrupt a discharge, as in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable M. T. DOOLING, Judge of the [94] said District Court this 16th day of February, in the year of our Lord one thousand nine hundred and seventeen and in the independence of the United States of America one hundred and forty-first.

M. T. DOOLING,  
United States District Judge.

**Return on Service of Writ.**

United States of America,  
Northern District of California,—ss. 8700.

I HEREBY CERTIFY AND RETURN that I served the within CITATION ON APPEAL, on the herein named H. S. WHITE, doing business under the name of H. S. WHITE MACHINERY COMPANY, Bankrupt; and also on WILDER WIGHT, his attorney, each, by handing to and leaving a true and correct copy thereof with, H. S. WHITE, doing business under the name of H. S. WHITE MACHINERY COMPANY, and WILDER WIGHT, his Attorney, each personally, Oakland, Alameda County, California, in said District on the 19th day of February, A. D. 1917.

J. B. HOLOHAN,  
United States Marshal,  
By I. W. Grover,  
Office Deputy.

[Endorsed]: Filed, Feb. 20, 1917, at 10 o'clock and 15 min. A. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk [95]

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(Title of Court and Cause.)

**(Admission of Service of Petition for Appeal,  
Assignment of Errors, and Order Allowing  
Appeal.)**

Receipt of a copy of petition for appeal by trustee in bankruptcy and order allowing appeal and receipt of a copy of assignment of errors in the above-entitled matter this day admitted by attorney for H. S. White, without any other admission or waiver whatsoever.

Dated Feb. 16, 1917.

WILDER WIGHT,  
Attorney for H. S. White.

[Endorsed]: Filed Feb. 26, 1917, at 2 o'clock and 45 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [96]

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(Title of Court and Cause.)

**Statement of Evidence to be Used on Appeal.**

The report and certificate of the referee in bankruptcy containing a summary of the evidence adduced at the hearing of the above-entitled matter, the following portions of said report and certificate are hereby referred to and herein incorporated to be used as a statement of the evidence on the appeal herein.



1. Page 1, commencing with paragraph 2, the first words of which are "That upon."

2. Page 2, adding after the words "which were overruled" said objections were as follows:

Mr. WIGHT.—The bankrupt objects to the introduction of any evidence by the trustee at this hearing; to the calling of any witnesses by the trustee; to any participation in this hearing or in any proceedings in opposition to his application for discharge by the trustee, or to the hearing or determination of the trustee's objections to his discharge, and moves that the opposition of the trustee and his specifications of objection be dismissed, stricken out and disregarded and moves that the Master report to the Court that nothing has been filed with him or with the Court that requires him to take testimony, on the grounds that the specifications of objection are fatally defective and insufficient in law and unauthorized by law; that they state no lawful or valid ground of opposition to the bankrupt's application for discharge according to the Bankruptcy Act as now in force; that they present no issue that should be considered or determined; for the reasons:

Firstly. The specifications of objections do not show the capacity of the objecting party and contain no allegation showing that the trustee was authorized by the creditors at a meeting called for that purpose to oppose the application for discharge herein.

Secondly. That the records and files in this



matter affirmatively show that the trustee was not so authorized.

Thirdly. All the allegations in the specification of objection are upon information and belief. [97]

Fourthly. The specifications of objection are not verified as required by law.

Fifthly. The specifications of objections wherein they seek to allege the destruction, concealment, or failure to keep books of account merely aver the words of the statute, and are uncertain, argumentative, and general.

Sixthly. The specifications of objections wherein they seek to allege the falsity of the statement averred to have been given to the Bank of California do not state, first, that said statement was "materially" false, or, second; wherein or how or in what manner or particulars said statement was false, and are uncertain and general.

Seventhly. That the allegations commencing with line 29, page 2 of the specifications of objection to and including line 22 of page 3 of said specifications are inferential and not positive.

Eighthly. That there is not any certain and specific allegation as to what amount of money the bankrupt is claimed to have procured from the Bank of California.

3. Page 3, omitting paragraph 1, the first words of which are "It therefore appears," and all thereafter on that page.

4. Page 4, omitting all to paragraph 2, the first

words of which are "The statement." After the word "item" and before the word "assets" insert: "For the purpose of procuring credit from time to time, with the above bank for our negotiable paper, or otherwise, we furnish the following as being a fair and accurate statement of our financial condition on the 31st day of December, 1912." [98]

5. Pages 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 16a and page 17 to paragraph 2, the first words of which are "It appears," and the second sentence in paragraph 2, omitting the first sentence.

6. Page 18, commencing with the last paragraph, the first words of which are "As to the bills."

7. Pages 19, 20, 21.

8. Page 22 to the last paragraph, the first words of which are "the bankrupt's explanation."

9. Page 23, commencing with paragraph 2, the first words of which are "As to the stock."

10. Pages 24, 25, 26, and page 27 to the last paragraph, pg. 28 commencing with the words "My deduction."

11. Page 29, commencing with the sub-title "Books."

12. Pages 30, 31, 32, and 33.

13. Page 34 to paragraph 1, the first words of which are "The testimony."

14. Insert: "The bankrupt opened his account with the Bank of California on April 19, 1913, by borrowing \$10,000, for which he gave his promissory note payable in 90 days. On July 18, 1913, he went to the Bank, executed a new note for \$10,000 payable in 90 days, drew his check for \$10,000



with which he paid his old note, with interest; and the old note was returned to him marked "Paid." (131.) On July 18, 1913, when his second note became due, he executed a new note for \$10,000 payable 90 days after date, drew his check and paid the second note with interest. (132.) When that note became due, which was on October 18, 1913, he executed a third note for \$10,000, again for 90 days, drew his check and paid his second note with interest. (132.) When that note became due, which was on January 20, 1914, he went through [99] the same transaction, executing his fourth note for \$10,000, payable 90 days after date, (6), paying the old one with interest with his check. (133. Ban. Ex. 4). On April 20, 1914, he repeated the transaction and executed his fifth note to the Bank of California for \$10,000 payable one day after date (Tr. Ex. B.), paying the old one with interest with his check.

Testimony of Mr. MOULTON.

Mr. WIGHT.—Now, in making that renewal note, Mr. Moulton, which is the note we have in evidence, do you remember whether or not you referred to this statement?

A. I don't remember. You are speaking now of the renewal note?

Q. The renewal note, yes.

A. I don't remember.

Q. But you won't say positively that you did do it?

A. No, I won't say positively that I did or did not.  
(14, 15.)



Mr. White never saw Mr. Anderson after his one conversation with him on April 19, 1913. (162.)

Testimony of Mr. ANDERSON.

A. I remember discussing with this gentleman the risky nature of the business he was conducting. (160.) I actually remember it, sir, because the thing impressed itself on my mind. It was the first experience that I ever had outside, with the other institution. It shocked me; on account of the fact, secondly, that he was engaged in a business that was hazardous, and that everybody knew was hazardous. (162.)

Mr. SHUEY.—Q. Was that the document that you saw at the time that you said that you had this conversation?

A. Those are the figures, Mr. Shuey. I cannot from memory say that that is the actual document.

Q. Was the document that was presented to you at that time substantially the same as that, so far as you can recollect?

A. Just the same. The statement was a statement of his standing at the close of business of the year 1912.

Q. That statement was furnished you by Mr. White, was it?

A. It was represented by Mr. White. (159.)

Mr. Wight, on cross-examination.

Q. You don't know whether that is the statement or not?

A. I don't know that that is the statement. It was a statement of December 31st, 1912. (159.)

## Testimony of Mr. MOULTON.

Mr. Wight, on cross-examination. Q. Do you remember, Mr. Moulton, exactly when this statement was received by you in relation now to the time when the loan was made?

A. No. It was received before the loan was granted.

Q. Now do you say that, Mr. Moulton, because of an independent recollection of the matter, or because of your ordinary course of business? [100]

A. The ordinary course of business.

Q. You have no independent recollection of it?

A. No.

Q. Then you can't say positively, now, referring now to your independent recollection, whether that statement was received or—

A. No, we either had the figures in some way, or that statement before the loan was granted. (11.)

The claim of the Bank of California contains the following items, April 20, 1914, loan of \$10,000; March 24, 1914, loan of \$1,200; March 25th, 1914, a loan of \$1,225; and February 22d, 1914, a discount of \$390; in the aggregate, without interest, the sum of \$13,198.

Mr. Moulton testified that in making the loan of \$1,200 on March 24th, 1914, that he did not remember whether he referred to Mr. White's statement or not, and that he would not say positively whether he did or did not. Likewise with the loan of \$1,225 on March 25, 1914, and the discount on March 29th of 383.30. The original \$10,000 loan was made by vir-

tue of Mr. Anderson's authority, and not Mr. Moulton's. (16, 9, 159.)

Mr. White testified that he always had some money in the safe, and that his statement was an honest one and not intentionally falsified. (144, 122.) That the item of \$122,654.74 in his statement represented all that he had in the way of assets, stock in San Francisco and other places. (G. T. 175, 176.) That John Jardine never was in his place of business at all after 1908.

John Jardine testified that he did not go over the whole of Mr. White's stock, and that it would be necessary so to do in order to determine its value. (54.) That his testimony concerned the value of the stock at 620 Brannan Street, San Francisco, and no other place.

Mr. White testified that he stored stock in several places on December 31st, 1912; that there were five separate places where stock was stored in the City and County of San Francisco on that [101] date, and besides he had a lot of machinery in Oakland and some in Placer County.

Mr. Ernsberger did not qualify as an expert. He testified that Mr. White had much stock that he was not familiar with, and based his estimate of value upon what a building the size of Mr. White's might contain. (89,90, 91.)

The following are excerpts from Dunn's report, which Mr. Moulton testified was in the possession of the Bank of California at the time the loan was made, was read by him, and that its contents were in his mind. (44, 47.)



Sept. 16, 1912.

“H. S. White, when interviewed at this time, stated that he had no inventory or balance sheet to submit, but could give the 1 following rough estimate of his present financial condition; present stock on hand must be worth at least \$140,000 and in addition he had between \$10,000 and 12,000 in good accounts receivable, and a small cash balance in bank, and current indebtedness is about \$20,000. His figures as to merchandise on *had* are regarded as quite full and more conservative estimates of outsiders place the value of his machinery and metal on hand at somewhere from \$65,000 to \$90,000.

It is thought that he is somewhat too widespread, and that he is of a somewhat speculative disposition and has accumulated rather too much stock on hand for his capital, and as a result is said to find himself hard up financially at times.

Altogether White is regarded as worth probably from \$50,000 to \$75,000 in clear available resources over and above his liabilities.

Oct. 3, 1912.

It is felt that he can be safely rated not to exceed \$75,000 in tangible net resources. (44, 45, 46.)”

Mr. White scheduled his stock in trade at the time of his bankruptcy at a value of \$90,000.

Mr. Moulton testified that if Mr. White's statement had shown \$10,000 more or less in the liabilities or assets that he would have been granted the loan just the same, and also that he would have loaned

Mr. White \$20,000 if he had asked for it. Mr. Anderson testified that if Mr. White's statement had shown a net worth of \$100,000 instead of \$130,000 that he still would have [102] granted him the loan. Mr. Moulton regarded the date of the inventory in the statement as immaterial.

On April 22, 1914, the Seaboard Bank attached Mr. White's stock in trade, and put a keeper in charge, who was there two months before Mr. Pentz took charge, and Mr. White testified that there was a lot of stuff missing since the attachment. (G. T. 4.)

The books of account which were in court and to which Mr. Herrick testified were not shown to be all of the books of account of the bankrupt, and objection to his testimony was sustained on that ground. The system of bookkeeping employed by Mr. White at the time of his bankruptcy was the same that he had pursued since the year 1900.

Q. Mr. White testified (G. T. 175-176):

Q. Now, you have also an item of \$122,654.25 merchandise in stock. What property did that consist of?

A. Everything that I had in the way of assets.

Q. Where?

A. Stock, San Francisco, and other places.

Q. What other places?

A. That I have already mentioned to you yesterday, part that I had already disposed of between that time and bankruptcy.

Q. Did it include the general stock in trade?

A. The general stock in trade wherever it may

have been located between that time and the time before, the time that I took stock, the time that the trouble occurred—I had no other stock.

Q. That was the stock that was over there at your place of business at that time? Is that correct?

A. And other places.

Q. What other places?

A. Wherever I may have had it at that time.

Q. What other places do you remember?

A. I had a number of going places at the time that I was a bankrupt.

Q. How much property did you have outside of your shop? [103]

A. I could not tell you at this time.

Q. About how much?

A. I have no possible way to say.

Q. Can you give any idea? A. I cannot.

Q. Would you say it was \$500,00?

A. I would not dare to say for the reason that I would buy certain machinery and it would not be in the shape of property. It would not reach the shape of property until it was ready to be disposed of right on the ground where I had it.

I hereby approve the foregoing as a statement of the evidence to be used on the appeal from judgment granting the bankrupt a discharge herein.

M. T. DOOLING,

Judge of the United States District Court in and for the Northern District of California, First Division.



[Endorsed]: Filed Apr. 20, 1917, at 3 o'clock and 45 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk [104]

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(Title of Court and Cause.)

**Stipulation for Diminution of Record.**

IT IS HEREBY STIPULATED AND AGREED, that the clerk of this court, in following the amended praecipe on file herein, shall omit the full title of court and cause, except upon the praecipe, and refer to the same as "Title of Court and Cause." Also, omit all verifications, except the one attached to the specifications of objections to the discharge, and refer to the verifications omitted, as "Duly verified."

WINFIELD DORN,

CLARENCE A. SHUEY,

Attorneys for Trustee.

WILDER WIGHT,

Attorney for Bankrupt.

Dated April 16th, 1917.

[Endorsed]: Filed Apr. 16, 1917, at 3 o'clock and — min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [105]

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**Certificate of Clerk U. S. District Court to Transcript on Appeal.**

I, Walter B. Maling, clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 105

pages, numbered from 1 to 105, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of H. S. White, doing business under the name of H. S. White Machinery Company, Bankrupt, No. 8700, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "amended praecipe for transcript of record for use on appeal" (copy of which is embodied in this transcript), and the instructions of the attorneys for trustee and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Fifty-four Dollars and Sixty Cents (\$54.60), and that the same has been paid to me by the attorneys for appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein (page 107).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 3 day of May, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

C. M. T. [106]

*In the District Court of the United States in and for  
Northern District of California.*

No. 8700.

In the Matter of H. S. WHITE, Doing Business  
Under the Name of H. S. WHITE MACHIN-  
ERY COMPANY,

Bankrupt.

**Citation on Appeal (Original).**

United States of America,  
Ninth Circuit,—ss.

To H. S. White, Doing Business Under the Name  
of H. S. White Machinery Company, Bankrupt:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city and county of San Francisco in said District on the 17th day of March, 1917, next, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the Northern District of California; First Division, in the above-entitled matter, to show cause, if any there be, why the judgment of the said District Court rendered in said matter and made and entered herein granting to said bankrupt a discharge, as in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable M. T. DOOLING,  
Judge of the [107] said District Court this 16th  
day of February, in the year of our Lord one thou-



sand nine hundred and seventeen and in the Independence of the United States of America one hundred and forty-first.

M. T. DOOLING,  
United States District Judge. [108]

**(Return on Service of Writ.)**

United States of America,  
Northern District of California,—ss. 8700,

I HEREBY CERTIFY AND RETURN that I served the within CITATION ON APPEAL, on the herein named H. S. WHITE, doing business under the name of H. S. WHITE MACHINERY COMPANY, Bankrupt; and also on WILDER WIGHT, his attorney, each, by handing to and leaving a true and correct copy thereof with, H. S. WHITE, doing business under the name of H. S. WHITE MACHINERY COMPANY, and WILDER WIGHT, his attorney, each personally, Oakland, Alameda County, California, in said District on the 19th day of February, A. D. 1917.

J. B. HOLOHAN,  
United States Marshal.

By J. W. Grover,  
Office Deputy.

[Endorsed]: Original. Marshal's Docket No. 8062. No. 8700. District Court of the United States, for the Northern District of California. In the Matter of H. S. White, Doing Business Under the Name of H. S. White Machinery Company, Bankrupt. Citation on Appeal. Filed at 10 o'clock and 15 min. A. M., Feb. 20, 1917. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

[Endorsed]: No. 2980. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of H. S. White, Doing Business Under the Name of H. S. White Machinery Company, Bankrupt. William R. Pentz, as Trustee in Bankruptcy of the Estate of H. S. White, Doing Business Under the Name of H. S. White Machinery Company, Appellant, vs. H. S. White, Doing Business Under the Name of H. S. White Machinery Company, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed May 3, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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*In the District Court of the United States in and  
for the Northern District of California.*

No. 8700.

In the Matter of H. S. WHITE, Doing Business  
Under the Name of H. S. WHITE MA-  
CHINERY COMPANY,

Bankrupt.

**Order Extending Return Day on Citation on  
Appeal to April 2, 1917.**

The undersigned District Judge having on the  
16th day of February, 1917, signed and issued in the



above-entitled matter a citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit by William R. Pentz, Esquire, as trustee of the estate of the above-named bankrupt from the judgment of the above court made and entered herein granting to said bankrupt a discharge and the return day in said citation on appeal having been set for the 17th day of March, 1917, but it appearing that without default of the said trustee in bankruptcy, the clerk of the above-entitled court has been unable to prepare the record on appeal so that it could be filed and docketed in the said United States Circuit Court of Appeals for the Ninth Circuit within the time fixed for the said citation on appeal, and good cause appearing therefor:

IT IS HEREBY ORDERED that the time for such return be and the same is hereby enlarged and that the said return day be and the same is hereby continued to the 2d day of April, 1917.

Done in open court this 17th day of March, 1917.

WM. W. MORROW,

Judge U. S. *Circuit of Appeals.*

[Endorsed]: No. 8700. District Court of the United States for the Northern District of California. In the Matter of H. S. White, Doing Business Under the Name of H. S. White Machinery Company, Bankrupt. Order Extending Return Day on Citation for Appeal.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ——— to File Record Thereof and to Docket Case. Filed March 19, 1917. F. D. Monckton, Clerk.



*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 8700.

In the Matter of H. S. WHITE, Doing Business  
Under the Name of H. S. WHITE MA-  
CHINERY COMPANY,

Bankrupt.

**Order Extending Return Day on Citation on  
Appeal to April 7, 1917.**

The undersigned, District Judge, having on the 16th day of February, 1917, signed and issued in the above-entitled matter a citation on appeal to the United States Circuit Court of Appeals, returnable on the 17th day of March, 1917, and the time for such return having been enlarged, and the said return day having been continued to the 2d day of April, 1917, and it appearing that without fault of the said trustee in bankruptcy, the clerk of the above-entitled court has been unable to prepare the record on appeal so that it can be filed and docketed in the said United States Circuit Court of Appeals for the Ninth Circuit within the time fixed for the return of said citation on appeal; and good cause appearing therefor:

IT IS HEREBY ORDERED that the time for such return day be and the same is hereby further enlarged and that said return day be and the same is hereby continued to the 7th day of April, 1917.

Done in open court this 31st day of March, 1917.

WM. W. MORROW,

United States Circuit Judge, Ninth Judicial Circuit.

[Endorsed]: No. 8700. In the United States Circuit Court of Appeals, for the Ninth Circuit. In the Matter of H. S. White, Doing Business Under the Name of H. S. White Machinery Company, Bankrupt. Order. Filed Mar. 31, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

In the Matter of H. S. WHITE, Doing Business  
Under the Name of H. S. WHITE MA-  
CHINERY COMPANY,

Bankrupt.

**Order Extending Return Day on Citation on  
Appeal to April 21, 1917.**

The undersigned, District Judge, having on the 16th day of February, 1917, signed and issued in the above-entitled matter a citation on appeal to the United States Circuit Court of Appeals, returnable on the 17th day of March, 1917, and the time for such return having been enlarged, and the said return day having been continued to the 7th day of April, 1917, and it appearing that without fault of the said trustee in bankruptcy, the clerk of the above-entitled court has been unable to prepare the record on appeal so that it can be filed and docketed in the said United States Circuit Court of Appeals for the Ninth Circuit within the time fixed for the return of said citation on appeal; and good cause appearing therefor:



IT IS HEREBY ORDERED that the time for such return day be and the same is hereby further enlarged and that said return day be and the same is hereby continued to the 21st day of April, 1917.

Done in open court this 7th day of April, 1917.

M. T. DOOLING,  
District Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of H. S. White, Doing Business Under the Name of H. S. White Machinery Company, Bankrupt. Order Enlarging Time for Return Day. Filed Apr. 7, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 8700.

In the Matter of H. S. WHITE, Bankrupt.

**Order Extending Return Day on Citation on  
Appeal to April 28, 1917.**

The undersigned District Judge having on the 2d day of April, 1917, enlarged the time for the return of the citation on appeal herein to and including the 21st day of April, 1917, and it appearing that without fault of the said trustee in bankruptcy the clerk of the above-entitled court has been unable to prepare the record on appeal so that it can be filed and docketed in the said above-entitled court within the time fixed for the return of said citation on appeal so enlarged, and good cause appearing therefor:



It is hereby ORDERED that the time for such return day be and the same is hereby further enlarged and that said return day be and the same is hereby continued to the 28th day of April, 1917.

Done in open court this 20th day of April, 1917.

M. T. DOOLING,  
District Judge.

[Endorsed]: No. 8700. In the United States Circuit Court of Appeals, for the Ninth Circuit. In the Matter of H. S. White, Bankrupt. Order.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Apr. 28, 1917, to File Record Thereof and to Docket Case. Filed Apr. 20, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

In the Matter of H. S. WHITE, Bankrupt.

**Order Extending Return Day on Citation on  
Appeal to May 7, 1917.**

The undersigned, District Judge, having on the 20th day of April, 1917, enlarged the time for the return of the citation on appeal herein to and including the 28th day of April, 1917, and it appearing that without fault of the said trustee in bankruptcy the clerk of the above-entitled court has been unable to prepare the record on appeal, so that it can be filed and docketed in the above-entitled court within the time fixed for the return of said citation on file so enlarged, and good cause appearing therefor:

It is hereby ORDERED that the time for such return day be and the same is hereby further enlarged and that the said return day be and the same is hereby continued and extended to the 7th day of May, 1917.

Done in open court this 28th day of April, 1917.

M. T. DOOLING,

District Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of H. S. White, Bankrupt. Order Enlarging Time for Return of Citation on Appeal. Filed Apr. 28, 1917. F. D. Monckton, Clerk.

No. 2980. United States Circuit Court of Appeals for the Ninth Circuit. William R. Pentz, etc., vs. H. S. White, etc. Five Orders Under Rule 16 Enlarging Time to May 7th, 1917, to File Record Thereof and to Docket Case. Re-filed May 3, 1917. F. D. Monckton, Clerk.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of

H. S. WHITE, doing business under the  
name of H. S. White Machinery Com-  
pany,

*Bankrupt.*

WILLIAM R. PENTZ, as Trustee in Bank-  
ruptcy of the Estate of H. S. White, doing  
business under the name of H. S. White  
Machinery Company,

*Appellant,*

VS.

H. S. WHITE, doing business under the name  
of H. S. White Machinery Company, Bank-  
rupt,

*Appellee.*

## BRIEF FOR APPELLANT.

CLARENCE A. SHUEY,  
WINFIELD DORN,

*Attorneys for Appellant.*

*Filed this*.....*day of September, 1917.*

*FRANK D. MONCKTON, Clerk.*

*By*.....*Deputy Clerk.*





No. 2980

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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In the Matter of

H. S. WHITE, doing business under the  
name of H. S. White Machinery Com-  
pany,

*Bankrupt.*

---

WILLIAM R. PENTZ, as Trustee in Bank-  
ruptcy of the Estate of H. S. White, doing  
business under the name of H. S. White  
Machinery Company,

*Appellant,*

vs.

H. S. WHITE, doing business under the name  
of H. S. White Machinery Company, Bank-  
rupt,

*Appellee.*

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## BRIEF FOR APPELLANT

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### Statement.

Appellant filed a petition in the District Court  
stating that the bankrupt had applied for a dis-

charge and that many of the largest as well as the smallest creditors desired him as Trustee to oppose the same, and prayed for an order authorizing him so to do (Tr. 8, 9).

The referee sent out notices to all of the creditors that the Trustee had filed a petition for an order authorizing him to oppose the discharge and that the petition would be heard at a certain time and place, and thereafter a meeting was held at the time and place specified in said notice (Tr. 20). At this meeting the application of the Trustee was heard and considered by a majority in amount and number of all creditors whose claims had been allowed and they announced and declared in favor of authorizing the Trustee to oppose the discharge (Tr. 72 and 84). Thereupon the referee asked if there was any creditor present who objected, and no objection being made, and all creditors assenting thereto, the referee made an order, from which no appeal was ever taken, expressly authorizing the Trustee to oppose the discharge (Tr. 10 and 20). Thereafter the Trustee filed an appearance in the District Court in opposition, stating that he had been first duly authorized by the court so to do (Tr. 11). Thereafter, within the time required, the Trustee filed specifications of objection to the application for discharge, to which the bankrupt filed an answer, the substance of which was a denial of the grounds of opposition (Tr. 19) and not denying authority of the Trustee or sufficiency of the specifications (Tr. 16).



The issues raised by the pleadings were referred to A. B. Kreft, Referee, as special master, to ascertain the facts and report his conclusions thereon, and the same came on regularly to be heard (Tr. 18). Counsel for the bankrupt then for the first time urged certain objections to the introduction of testimony (Tr. 100). After lengthy arguments and briefs filed, the question whether the objections were well taken was submitted to the special master and after careful consideration the objections were overruled and the Trustee instructed to proceed with his evidence (Tr. 19), and testimony covering three hundred and ninety-four pages was introduced and the matter being submitted, and authorities presented, the master made a lengthy report to the District Court in which he commented on the intelligence and shrewdness of the bankrupt, and declared that the bankrupt's testimony was not to be credited and that his statements were destitute of those elements which commanded confidence and justified judgment, and that it was the master's conclusion that the bankrupt had, *with the intent* to conceal his financial condition, failed to keep books of account or records from which such condition might be ascertained, and had given a false statement to the Bank of California at the time of obtaining a loan therefrom, and the master thereupon found that the charges against the bankrupt had each and all been proven and recommended as his con-

clusion that the bankrupt's discharge be denied (Tr. 18 at 59, 61, 62).

No exceptions were taken by the bankrupt to this report and all matters, both in law and fact, having been decided in favor of the Trustee, appellant herein, there was no occasion for him to take exception, and therefore he asked that the District Court confirm the same. Thereafter the District Court, disregarding the findings and recommendations of the referee, and reversing certain rulings of the referee as set forth in the master's report, and without giving the Trustee any opportunity to offer testimony or ask leave to correct the record to conform to the contrary ruling on the objections, made an order granting the application of the bankrupt for a discharge upon the ground that the facts as set forth in the referee's report did not show that the Trustee had been duly authorized to oppose the discharge (Tr. 63-65).

Thereupon the Trustee immediately filed a motion with affidavits to vacate the order granting the discharge, and for an order re-referring the matter to the master in order that the Trustee might not be prejudiced by the contrary ruling of the court and might have the same opportunity to ask leave to amend and offer new testimony that he would have had in the first instance, and that the master might certify and find as to the actual facts relating to the Trustee's authority, which had

been omitted (Tr. 68), and if inserted would show that at a meeting of creditors duly called the matter of the Trustee's application for authority to oppose the discharge was held and considered by a majority in number and amount of the creditors of the estate whose claims had been allowed, and that all of said creditors present or represented had announced and declared in favor of authorizing the Trustee to oppose the discharge, and the referee thereupon, after asking if any creditors objected, and receiving no reply, made an order authorizing the Trustee to oppose the discharge (Tr. 69-73).

At the time of filing said motion to vacate, the Trustee, as a further protection to the Trustee and creditors' rights, filed a petition for rehearing, with affidavits setting forth these facts, and asking for a rehearing of the matter in order to introduce the testimony in support of the Trustee's actual authority above indicated (Tr. 74-82).

Thereafter the District Court made an order denying both the motion and the petition for rehearing (Tr. 93) and granted the discharge from which this appeal is taken.

The question presented for this court to determine is whether the judgment of the District Court disregarding the findings and recommendations of the master and reversing certain of his rulings, and denying the motion to vacate and for rehearing, and granting the bankrupt a discharge, was



erroneous and against the just rights of the Trustee.

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### Assignments of Error.

All of the assignments of error are relied upon and may be considered under two main divisions.

*First.* Assuming that the District Court was correct in deciding that the record was insufficient to permit it to follow the master's findings and recommendations, it erred in forthwith granting the discharge to the bankrupt without giving the Trustee the right and opportunity to correct the record to conform to the facts (Assignments 17-21 inclusive).

*Second.* That on the record before the District Court it erred in granting the discharge (Assignments 1-16 inclusive).

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### Argument and Authorities.

#### FIRST.

ASSUMING THAT THE DISTRICT COURT WAS CORRECT IN DECIDING THAT THE RECORD WAS INSUFFICIENT TO PERMIT IT TO FOLLOW THE MASTER'S FINDINGS AND RECOMMENDATIONS, IT ERRED IN FORTHWITH GRANTING THE DISCHARGE TO THE BANKRUPT WITHOUT GIVING THE TRUSTEE THE RIGHT AND OPPORTUNITY TO CORRECT THE RECORD TO CONFORM TO THE FACTS.

While it is the policy of the law, as laid down by Congress in the Bankruptcy Act, to give to the

honest but unfortunate debtor relief from his creditors by a discharge, and therefore only a few specific grounds of objection to cover dishonest cases have been enumerated under the Bankruptcy Act, yet it is also clearly the policy of the law in cases where the bankrupt has been guilty of intentional dishonesty and brought himself within these grounds of opposition, to deny him any relief in the form of a discharge. The cases upholding this policy are so numerous and well known to this court that we will only refer to *In re Glass*, 119 Fed. 509, hereinafter quoted. In the instant case the report of the master to the District Court (Tr. 18-62) shows conclusively that the bankrupt herein was of the latter class, he having with intent failed to keep books and made a false statement in order to defraud his creditors. Therefore it is the duty of this court to grant such aid to the creditors as is legally within its powers in order to carry out the policy of the law and prevent a dishonest debtor from escaping liability to his creditors.

From the opinions of the District Court (Tr. 63, 91) it might appear that the Trustee was not taken by surprise and was guilty of laches or negligence in presenting his case. Therefore we wish first to call this court's attention to the course pursued by the Trustee, and the prejudice to him, through no intentional fault of his own, resulting from the decision of the District Court. The first time any question was made as to the authority of

the Trustee to oppose the discharge was on the day of the hearing before the master, although months had elapsed in which the bankrupt might have amended his answer or in other ways raised the point if he had seen fit. When the objections were raised, the master sitting as an arm of the District Court, decided in favor of the Trustee on all objections made. No appeal was taken by the bankrupt and there was no reason for the Trustee's doing so when the decision of the master had been entirely in his favor. Therefore, there was no negligence or laches so far on the part of the Trustee. The Trustee most diligently offered a large amount of testimony and the master decided again in his favor on the merits. Therefore, there was still no cause for him to take other steps than those taken. The report of the master came on for confirmation before the District Court, and the same being in favor of the Trustee, there was no occasion for him to take any step other than that taken, namely, to ask for confirmation. At any time prior to confirmation any act upon the part of the Trustee to proceed other than as he did would have been to act contrary to the decision of the master and been merely consuming the time of the court and running up expense to the estate unnecessarily. Therefore, the first time the Trustee was called upon or permitted to proceed, other than in accordance with the master's ruling, was when the District Judge reversed the rulings of the master as to the authority of the



Trustee necessary to oppose the discharge. There-upon immediately the Trustee, with great diligence, filed a motion to vacate, with affidavits, and a petition for rehearing, with affidavits. Upon this record can there be any criticism of laches or neglect upon the part of the Trustee?

Now suppose the master had, instead of deciding in favor of the Trustee, decided against him, what course would he have pursued? Immediately he would have proceeded to cure defects in the pleadings, if there were any, by asking leave to amend, which would have been granted undoubtedly, as it is the spirit of the bankruptcy law to try and see that justice and not technicalities prevail in a case of this character. He would without difficulty have offered evidence showing conclusively that the Trustee had been authorized by the creditors, and the matter would have been finally determined on the merits.

Furthermore, suppose the District Court had seen fit to hear the whole matter without the assistance of a master, what would have been the result? When the objections were urged by the bankrupt the court would presumably have sustained them. The Trustee would then immediately have had the opportunity to take the same steps as he would have taken before the master upon a similar ruling in order to protect the interests of the creditors whom he represents. Now in the instant case the Trustee had not such opportunity at any time until the District Judge made the order reversing the

master and granting the discharge. Immediately upon this order being made the Trustee took as nearly as possible the same course by motion and petition to obtain relief that he would have taken if there had been any previous occasion or reason therefor. The District Court upon his so doing in some way came to the conclusion erroneously that there had been laches upon the part of the Trustee and denied the motion of the Trustee. Therefore it clearly appears that the Trustee's rights have been greatly prejudiced by the conflicting rulings of the District Court and its master, due to the fact that the District Court granted a discharge instead of merely reversing the ruling of the referee and placing the matter back where it was at the time the objections were overruled by the master and permitting the Trustee to take such steps as he might have taken at said time without prejudice.

Furthermore, the opinion of the District Court (Tr. 92) states that the Trustee was not taken by surprise, for the bankrupt urged from the beginning the lack of authorization of the Trustee. While that may be true if the language of the objection is read with one interpretation, it is not true if read as interpreted by the master and attorneys for the Trustee at all times up to the decision by the District Court reversing the referee. The bankrupt on the hearing before the master of objections to introduction of testimony, when told that actual authority had been given by

the creditors at a meeting of creditors took the position (Tr. 73) that that made no difference because the notice sent out by the referee to the creditors calling the meeting was defective and no legal meeting was held, and therefore the whole proceeding being a nullity, no authority had been given the Trustee by the creditors. There is nothing in the record before the referee showing that the bankrupt ever made any other contention, and the District Court's interpretation otherwise of the objection was the first time either of counsel for the Trustee ever heard of such contention being urged by the bankrupt (Tr. 70, 73). The master's report also confirms this and shows clearly that the point taken by the bankrupt was "that the notice sent out by the referee of the hearing upon the Trustee's application" was defective and therefore no meeting being duly held, the Trustee had not authority (Tr. 20).

From the above it is clearly apparent that a dishonest debtor has been discharged from his debts and the creditors represented by the Trustee have been greatly prejudiced by the order of the District Court, through no fault on their part or that of the Trustee.

The policy of the law, as before stated, in reference to a discharge in bankruptcy, is to have the same determined upon the merits. The report of the master shows clearly that the bankrupt in this case was intentionally guilty of fraud and should not have been granted a discharge on the merits.



In the case of *In re Glass*, 119 Fed. 509, frequently referred to since said time, the court said:

“It is admitted by counsel that the specifications are not in proper form and leave is asked to amend them. Objection is made that there is nothing by which to amend, the specifications being so entirely defective. There was an old doctrine that amendments could be made only where a good cause of action was defectively stated, but in modern practice, and especially under our liberal federal statutes of amendments, an entirely new cause of action may be stated in a pleading by way of amendment and there are some very radical and startling rules to that effect. Some decisions are against this, particularly where the bar of the statute of limitations is involved or some like effect is the result of allowing the substitution of the new ground of action. Still the modern rule is that of great liberality in quite all cases and it seems to me that if a bankrupt has been guilty of any of the offenses for which his discharge may be opposed the most liberal rule of amendment of specifications should prevail and that he should not be allowed to escape by the failure of the creditors to properly plead the grounds of opposition. The ordinary discretion of the court will protect the bankrupt against any injustice in the application of this liberality of amendment; his privilege of discharge from his debts is purely a matter of statutory grace and not of any common right at all and he should expect always to be denied discharge unless he complies strictly with the conditions entitling him to that indulgence by refraining from any wrongdoing denounced by the statute as a bar to his discharge. Here the specifications indicate that if the facts be properly pleaded there may be a bar, not certainly so, and it may in the end turn out to be only a fraud

upon creditors not made a ground for opposing the discharge, but it may be otherwise, and the averments are not so entirely destitute of all merit as to invoke even the old rule of amendment relied on by the bankrupt's counsel."

The court then cites a large number of cases and says:

"The practice as to amendments under the existing bankruptcy statute of 1898 is just as liberal as under the former act and in other courts. \* \* \* The bankruptcy statute being very liberal to the debtor in the matter of his discharge, confining the grounds of opposition to conduct on his part of a criminal nature of *quasi*-criminal carelessness and negligence, he should not be allowed to receive the acquittance of the statute because of any embarrassment or obstruction encountered by his creditors in presenting their opposition to his application for it. Only negligence of a culpable character on their part should debar them from the benefit of Revised Statutes, Section 954, as to the amendment of their specifications, and these, it seems to me, are the considerations which should control the court in the exercise of its discretion in the premises."

Furthermore, the master was an arm of the District Court, sitting in its aid.

In the case of *Rauchenplat*, 9 A. B. R. 763, the court said:

"The opinion and order granting a discharge was entered herein on June 12, 1902. Motion for rehearing was made on June 18, 1902. The ground of it is that the referee exceeded his jurisdiction in reporting to the



court that the objections of the creditors to the discharge are not sustained by the evidence taken by him. The order of reference directs him to report the facts, with the evidence taken, to the court, together with his findings as to the same.

“The application for discharge must, by section 14 of the Bankrupt Law, and General Order in Bankruptcy, No. 12, Section 3, be heard and decided by the judge of the court. The referee has no jurisdiction to determine the question, but the court may refer the case to him generally for a report. He aids the court like a master of chancery. He cannot finally determine the question of discharge or nondischarge, but he may be ordered to report the facts and his recommendation or conclusion as to the matter. This is merely to aid the judge, and the court then determine the matter. The practice in bankruptcy is much like that in equity, and it is hardly supposable that the law-making power intended that a court, if it saw proper, should not avail itself of such aid. (In re Kaiser, 2 Am. B. R. 767, 99 Fed. 689).”

The errors of the master were therefore the errors of the court and should be corrected if possible without injury to the Trustee.

“Where the defect does not consist in a total failure to state some element of the act admitted to be alleged, but consists only in stating it with not sufficient definiteness, it would seem to be the better rule that such defect should be urged before the hearing and that it is waived by going to hearing thereon without objection.”

*Rem. on Bankruptcy*, Vol. 2, Sec. 2610.



Therefore, if this whole matter had been heard before the District Court in the first instance, the question as to the authority of the Trustee and the sufficiency of the pleadings would have been passed upon and defects, if any, as to the record would have been corrected and the case would have proceeded to final determination upon the merits and a discharge would have been denied the bankrupt herein.

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SECOND.

**THAT ON THE RECORD BEFORE THE DISTRICT COURT IT  
ERRED IN GRANTING THE DISCHARGE.**

It may be contended that the question whether the District Court erred in denying the motion to vacate the order granting a discharge and denying the petition for rehearing cannot be raised upon this hearing, but such contention cannot be sustained. The very fact that in one decided case it is implied that no appeal can be taken from an order denying a petition for rehearing or a motion to vacate the order granting a discharge shows that the denial of such a petition or motion can only be considered on an appeal from the judgment which does not become final until the petition or motion is denied. The time within which to appeal does not begin to run from the order first made granting the discharge, but from the order denying the motion or petition for rehearing.

In *Mills v. Fisher*, 159 Fed. 897, C. C. A., Sixth Circuit, where a petition for rehearing was filed after the court had made an order appealable under Section 25 of the Bankruptcy Act as in this case, the appellate court said:

“The objection that the appeal was too late is not well founded. Before the ten days allowed for an appeal had expired a petition to rehear was filed. Within ten days after this was disposed of and the judgment thereby made final this appeal was prayed and allowed. This was in time.” (Citing cases.)

Therefore the petition for rehearing and motion with affidavits were before the District Court at the time that judgment became final and are before this court for consideration in determining whether there was error in said final judgment. If such was not intended to be the practice undoubtedly Congress would have granted some relief by appeal from the order denying the petition for rehearing or from the order denying the motion to vacate the order granting the discharge.

Under the law of this State on an appeal from a judgment the court may review any order made on motion for new trial.

See Sec. 956, Code of Civil Procedure of California.

“Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially

affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken.”

Therefore the record as forwarded to the District Court and the petition for rehearing and motion to vacate with affidavits are properly before this court for consideration in determining whether the District Court erred in entering its final judgment granting the discharge.

But apart from the error of the District Court in denying the timely application of the Trustee for relief against technicality, we respectfully submit that even on the record as made by the master to the District Court, a discharge should have been denied. We say this for the reason that the findings of facts of a referee are conclusive unless manifest error is shown and no attempt to do this was made here. (*In re Noyes*, 144 Fed. 506 (C. C. A., Mass.).)

We believe that the District Court erred in its construction of the record certified to by the master to the District Court, which shows among other facts:

1. The petition for a discharge (Tr. 4);
2. The petition for authority to oppose the application of bankrupt for discharge (Tr. 8);
3. Notice of application sent to creditors calling meeting for hearing on application (Tr. 20);



4. Order granting Trustee authority to oppose the discharge (Tr. 10);
5. Appearance of Trustee on opposition (Tr. 11);
6. Specifications of objection of Trustee (Tr. 12);
7. Answer of the bankrupt to specifications (Tr. 16);
8. Master's report stating the objections to authority given Trustee (Tr. 19).

From an examination of this record it appears that a meeting of creditors was held for the purpose among others of authorizing the Trustee to oppose the discharge and that at this meeting an order was made by the referee authorizing the Trustee so to do and no creditor objected thereto (Tr. 20). While it may be true that it would be better practice for some of the pleadings to have more fully set forth the facts and for this order to have contained a more specific finding of fact, namely,—that it was made at the request of a majority in number and amount of creditors whose claims had been allowed and were present at a meeting called for the particular purpose, yet all of these pleadings certainly contained sufficient facts to warrant a court's granting leave to amend if promptly asked and the order has nothing in it showing that it was not properly made and the burden is on those attacking it to show that it was

not properly made as all intendments are in favor of the validity of judgments of courts.

Creditors meetings are commonly under the law held before the referees before whom most of the administration of estate is had and they report to the court. Otherwise no record of the same would exist. When the creditors at these meetings act it is clearly intended that the referee shall as chairman of the meetings obtain the will of the majority and record their decision, which was done in this case by the order. Therefore as such officer his recordination of the ultimate fact, namely, whether the majority did or did not authorize the Trustee, should be final unless directly attacked. If so attacked the one so doing should at least have the burden of establishing facts showing that the will of the meeting was other than recorded. In this case the order of the referee as chairman not showing anything on its face to the contrary, imports that it was made at the instance of the creditors in the manner required by law, and, nothing whatever appearing in the record herein to show the contrary, the District Court erred in holding that the Trustee's offering of the order to oppose the discharge was not at least *prima facie* proof of his actual authority.

Furthermore, from the Congressional Record in reference to this amendment, the purpose was to protect the creditors and not the bankrupt. See report No. 691, Senate Judiciary Committee, reading as follows:

“The first of these changes, making the Trustee a competent party to oppose a bankrupt’s discharge, is a desirable change, as thereby the expense of the proceedings in opposition to discharge will be spread over all of the creditors and not borne by a single creditor who may vouch objections. Moreover it lessens the danger of improper oppositions to discharge by single creditors for the purpose of enforcing settlements. The second change, namely, that the Trustee can only oppose discharge when authorized to do so at a meeting of creditors, is also desirable, affording a proper check upon improvident and improper opposition to discharge.”

No provision is made requiring the referee to give notice to the bankrupt of the Trustee’s application for authority to oppose the discharge, and if he had appeared at the meeting and opposed thereat the will of the majority it would have availed him nothing. Therefore why should he have the right in this proceeding to question the authority given the Trustee by the order of court made at the meeting of creditors and importing on its face that it was a record of the will of the majority properly given? The specifications were not defective in substance because they were made by a Trustee who under the act is a proper party, if not at all times, at least after authority has been given him by the creditors.

“The Trustee, however, is not a party to the proceedings for discharge until he has been made so by the directors at a meeting called for that purpose. *When the authority is ob-*



*tained he becomes a party to the proceeding by filing his specifications of objections."*

*In re Hockman*, 205 Fed. 332.

In the present case proper authority in fact had been given and the records show that the appearance and specifications of the Trustee had been filed, reciting the Trustee's authority from order of the court, and answer thereto only denying the grounds of opposition; *also the order of court made as evidence of the conclusion of the creditors in giving this authority to the Trustee.*

While a bankrupt is not obliged to file an answer or other plea in resistance to the specifications of objections (*In re Logan*, 102 Fed. 876), yet where he elects so to do and by his filing an answer leads the Trustee and the referee to believe that the only issues were as raised by the pleadings, he should be bound thereby. If he is not to be so bound, the same liberality should be extended the Trustee by the court in order that there shall be no prejudice and that the Trustee shall be able to correct any omissions resulting from such action on the part of the bankrupt.

Under specific rules of some of the district courts it is the settled practice to require the sufficiency of specifications of objections to the discharge of a bankrupt to be raised before the judge on motion within a specified time. This is so in the State of New York (*In re Baldwin*, 119 Fed. 796). In other districts, such as here and Massachusetts, there are

few specific rules with reference to procedure in bankruptcy, the courts taking it upon themselves to informally see that justice prevails.

“Counsel for the joint creditors raised certain formal objections based upon the state of the record. It is sufficient to say that this court has not hitherto required and does not intend to require hereafter any particular formalities to be observed in seeking a review by the Judge of the orders or other proceedings of a referee. If the matter in dispute is substantially set out that is enough. \* \* \* If this practice shall seem lax to some, the answer is that it has hitherto been found sufficient in this district, both for the Judge and for the parties, and it has not been abused. A stricter practice has been adopted in some other districts, doubtless because it has been deemed convenient there.”

*In re Swift*, 118 Fed. 349.

It makes very little difference which course is pursued so long as consistently followed. If a specific rule had been provided, in the instant case we would not be before this court, because the questions now raised would have been determined or waived before the hearing was concluded before the referee. Since there is no rule in this district and the District Court has seen fit to be liberal with reference to the bankrupt by permitting him to make objection to the specification months after the same had been filed by the Trustee and answer thereto filed by the bankrupt, the District Court should extend the same liberality to the Trustee in order

to permit the Trustee to protect the rights of the creditors of the estate. If the bankrupt had desired to ascertain more fully the facts surrounding the authority given the Trustee, he might have filed a special demurrer and asked that the specifications be amended so that they would set forth the facts and circumstances surrounding the making of the order authorizing the Trustee to oppose a discharge, but he did not so do.

The wording of the Bankruptcy Act in question is:

“Provided that a Trustee shall not interpose objections to a bankrupt’s discharge *until has been authorized so to do at a meeting of creditors* called for that purpose.”

So far as known to counsel, the Supreme Court has not interpreted this proviso. Certain of the District Courts have done so in certain respects but in no respect which militates against the substantial position of the Trustee herein.

In all of such cases the record affirmatively showed that the Trustee had not been authorized by the creditors. In the instant case we believe that the record by fair intendment shows that the Trustee was in fact actually authorized by the creditors, but if it does not so show we ask with what we believe to be all possible diligence the right to such relief as will enable us to make the record show such fact.



In the case of *Churchill*, D. C. Wis. 197 Fed. 114, where, at a meeting, creditors had authorized a Trustee to oppose a discharge, the referee made an order granting authority but only upon certain conditions. The Trustee and creditors being dissatisfied with the conditions, reviewed the order and the court stated that regardless of whether or not a Trustee was a party in interest and capable of opposing the discharge before 1910, that now there was no question of such capacity, provided only that the creditors at a meeting called for that purpose authorize him so to do, and said:

“The act gives to creditors the privilege of determining whether such right to exercise and the extent of such authority is based upon the statute. The action of the creditors is merely a prerequisite.”

It will be noted in that case that an order was made which evidenced the will of the meeting incorrectly on its face. No criticism was made of the procedure taken, but of the fact that the referee erroneously tried to act contrary to the will of the meeting and on review was reversed.

In the instant case there is nothing in the record which was before the District Court showing that the creditors did not give such authority as indicated in the order from which no review was taken by the bankrupt. On the other hand, there was before the District Court the fact that a meeting had been duly called and held for such purpose; that no creditors objected to the Trustee's being

authorized to oppose the discharge; that the referee had made an order at the meeting so authorizing the Trustee, after asking if there was any objecting creditor, presumptively in order to determine whether the will of the meeting which he was recording was unanimous. The affidavits of both of counsel for the Trustee were to the effect that a majority in number and amount of creditors of the estate whose claims had been allowed and were present had announced and declared in favor of authorizing the Trustee to oppose the discharge. There was no denial of these facts. It is true the bankrupt's attorney also made affidavit on opposition to the petition for rehearing and the District Court in its opinion (Tr. 91) said:

“I see no reason in view of the conflicting affidavits now presented for disturbing the conclusions heretofore reached.”

But as will appear from the affidavits on this point, there was no conflict. The bankrupt's attorney was not present at the creditors' meeting and had no knowledge of what took place at the meeting and in his affidavit merely stated that he believes no actual authority had been given because the record did not show it. He offered no evidence in denial of affidavits of counsel for the Trustee. If he had done so the testimony of the referee and several creditors present at the meeting could promptly have been obtained to substantiate our affidavits.

While the record before the District Court was not in such perfect form as it might have been, in the light of the ruling of that court, yet we do believe it was amply sufficient under the liberal practice which has prevailed in bankruptcy matters, and in which practice we believe that it has been the disposition of the court to discourage technicalities and render decisions upon the merits.

The District Court in its opinion has stated that we were not taken by surprise. By our interpretation, which was further borne out by the referee in his report, and which we believe was fair, the objection was that no proper notice of the meeting had been given and therefore no authority could legally be given by the creditors thereat. While there may have been a conflict in the affidavits on the motion to vacate as to the reasonableness of our interpretation of the objection raised to the Trustee's authority, there was none as to the proposition that actual authority had in fact been given by the creditors at the meeting which the District Court held had been legally noticed. This is most significant evidence that there was such actual authority, but our plea to this court is not with the idea of relieving ourselves of responsibility if there be a technical defect in the record but in the honest belief that it is proper for this court upon the record before it to avoid what must otherwise manifestly appear to be a miscarriage of justice.



Therefore we ask reversal of the judgment of the District Court, with such other relief as to this court may seem proper.

Dated, San Francisco,  
September 29, 1917.

Respectfully submitted,

CLARENCE A. SHUEY,

WINFIELD DORN,

*Attorneys for Appellant.*



IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of

H. S. WHITE, doing business under the name  
of H. S. White Machinery Company,  
Bankrupt.

WILLIAM R. PENTZ, as Trustee in Bank-  
ruptcy of the Estate of H. S. White, doing  
business under the name of H. S. White  
Machinery Company, Appellant,

vs.

H. S. WHITE, doing business under the name  
of H. S. White Machinery Company, Bank-  
rupt, Appellee.

## BRIEF FOR APPELLEE.

WILDER WIGHT,  
Attorney for Bankrupt, and  
Appellee.

Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk:

By .....Deputy Clerk.





No. 2980.

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of H. S. White Machinery Company, Bank-  
rupt, Appellee.

## BRIEF FOR APPELLEE.

### STATEMENT

The bankrupt regularly made application for his discharge. (Tr. 4). The trustee appeared in opposition thereto. (Tr. 11).

The trustee was not authorized to make this opposition by a vote of the creditors at a meeting called for that purpose, as is clearly required by Section 14b of the Bankruptcy Act.

The trustee did petition to the Court for an order authorizing him to enter his opposition (Tr. 8), and notice of the time and place of the hearing of this petition was sent to the creditors (Tr. 20), and the Referee in Bankruptcy did make such an order (Tr. 19). This much of counsel's statement of facts is true. It is not true that there was a meeting of the creditors at the time and place stated in the notice, or any other time or place. There is no evidence of any such meeting, nor is there evidence that a single creditor responded to this notice. This is positively and emphatically stated, and all of counsel's statements or intimations that there was a meeting of creditors or creditors present at the time of the hearing of this petition are entirely unwarranted by any evidence whatsoever.

The hearing was referred to the Referee to ascertain and report the facts. At the very inception of this hearing the bankrupt made objection that it should not be proceeded with on the ground that the trustee was not a proper party in interest, he never having been authorized by the creditors to oppose the discharge as is required by the Act (Tr. 20).

The objection was overruled. Evidence was taken



and the Referee as a Special Master reported recommending that the discharge be denied.

When this report came before the District Court for confirmation the point was again raised. Attention was called to the fact that neither the specifications alleged nor the evidence showed that the trustee was a proper party in interest, and motion was made that the discharge be granted on the ground that the opposition, being invalid, should be disregarded, and the Court so ordered. The discharge was granted then and there, and not after the denial of the trustee's motion to vacate the judgment, as counsel states.

Then counsel for the trustee made his motion to vacate the judgment granting the discharge, and in his supporting affidavit is the first intimation that there was in fact a meeting of creditors and in fact an authorization to the trustee by them. Before this affidavit nothing, either in the specifications by way of allegation, in the evidence anywhere, or in the records or files.

The question presented for this Court to determine is whether, in view of the record on appeal, the judgment granting the bankrupt a discharge is a proper or an erroneous judgment, and this does not include a review of any of the proceedings had after judgment.

## I.

NO APPEAL HAS BEEN TAKEN FROM THE ORDER DENYING THE TRUSTEE'S MOTION TO VACATE THE JUDGMENT OF DISCHARGE.

By far the greater part of counsel's brief is devoted to the claimed error of the District Court in denying the trustee's motion to vacate the discharge.

Counsel has, however, taken no appeal from this order. His petition for appeal states that he appeals from *the judgment of the Court granting the bankrupt a discharge*. (Tr. 93).

An order denying a motion to vacate a judgment is an order made after judgment, and must, to be reversed or set aside, be appealed from, *provided always there is an appeal*.

In the present case no appeal has ever been taken. The trustee has appealed from the judgment of discharge and from that only; and that appeal has been allowed and that only (Tr. 93).

## II.

THERE IS NO APPEAL FROM AN ORDER DENYING A MOTION TO VACATE A DISCHARGE IN BANKRUPTCY.

Section 25a of the Bankruptcy Act enumerates what

appeals may be taken in bankruptcy cases; and these appeals and no others can be taken.

Thompson vs. Mauzy, 174 Fed. 611.

No appeal from an order refusing to vacate a discharge is mentioned.

### III.

**THE DENIAL OF THE MOTION TO VACATE THE DISCHARGE WAS EMINENTLY PROPER ON THE MERITS.**

*A. The Grounds of the Motion Are Entirely Untenable.*

The ground upon which the trustee based his motion to vacate, as stated in his notice of motion, was that he was in fact duly authorized to oppose the discharge and the failure of the Referee in Bankruptcy to so find was due to excusable neglect on his part (Tr. 68).

There is no evidence in the record of any such authorization. This is unequivocally stated.

The ground of his motion is then, that the Referee in Bankruptcy, through excusable neglect, failed to find as a fact *something of which there is absolutely no evidence.*

*B. No Showing Was Made In Support of the Motion.*



Where, in a motion to vacate a judgment, counter affidavits denying the affidavits in support of the motion are filed, as there were in the case at bar (Tr. 86), the facts stated in support of the motion must be established by a preponderance of the evidence, and the burden is upon the moving party.

23 Cyc. 960.

There was absolutely no showing made in the case at bar. The affidavit filed in support of the motion, being denied, avail nothing. The facts claimed should have been proved. There should have been a showing made.

There was absolutely none.

A motion to vacate is addressed to the sound legal discretion of the trial judge, and his decision can be disturbed only for a manifest abuse of that discretion.

23 Cyc. 895.

Is it claimed that the trial Court in the case at bar was guilty of an abuse of discretion in denying the motion to vacate the discharge which was supported by no showing, and made on the ground that the Referee failed to find as a fact something of which there was no evidence?

This, then, disposes of that portion of counsel's brief devoted to the District Court's failure to set aside the discharge. He took no appeal from the order. He could have taken none. The grounds of the motion are unten-

able and no showing was ever made to support the motion.

#### IV.

**A TRUSTEE IN BANKRUPTCY IS NOT A COMPETENT PARTY TO OPPOSE A DISCHARGE UNTIL HE HAS BEEN AUTHORIZED SO TO DO BY VOTE OF THE CREDITORS AT A MEETING CALLED FOR THAT PURPOSE.**

The Bankruptcy Act explicitly provides that a trustee shall not interpose objections to a bankrupt's discharge until he has been authorized so to do at a meeting of the creditors called for that purpose.

Bankruptcy Act (36 Stat. 839) Sec. 14, sub. b.

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, as such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has, etc. \* \* \*

*Provided that a trustee shall not interpose objections to a bankrupt's discharge until he has been authorized so to do at a meeting of the creditors called for that purpose."*

There is absolutely *no evidence* that the trustee was ever authorized by a meeting of the creditors to oppose this discharge. There was not even a legally constituted meeting. There is *no allegation* of any such authority in the specifications of objection. The only authority the trustee had was an order of the Referee in Bankruptcy.

The provisions of the act itself are so unequivocal to the effect that a trustee in bankruptcy, before he is competent to oppose a discharge, must first be authorized by the creditors in a legally constituted meeting, as to hardly require the citation of authority. There are, however, many such decisions.

In re Churchill (D. C. Wis.) 197 Fed. 114.

In re Hockman (D. C. E. D. Penn.) 205 Fed. 330.

Remington on Bankruptcy (2d) Secs. 2463½, 572, and 593½.

Loveland on Bankruptcy (4th) Sec. 714.

Collier on Bankruptcy (9th) Page 315.

The objection of the bankrupt (Tr. 100, 101) to any hearing of the matter at the instance of the trustee, who was not a competent party, should have been sustained, and the decision of the District Court so deciding is correct.

*A. Specifications of Objection Which Fail to Show the Capacity of the Objecting Party, and That He Is Entitled to Oppose the Application for Discharge Are Fatally Defective, and Present No Issue That Should Be Considered or Determined.*

There is no allegation in the specifications of objection (Tr. 12 to 16) to the effect that the trustee was authorized by a meeting of the creditors to oppose this discharge. Lacking such allegation, *they are fatally defective in substance*, and do not state a cause of opposition.

Remington on Bankruptcy (2nd) Sec. 2594.



In re Servis (D. C. Iowa) 140 Fed. 222.

In re Chandler, 138 Fed. 637.

In re Levy (D. C. N. Y.) 133 Fed. 572, 576.

In re Main (D. C. Iowa) 205 Fed. 421.

*B. The Specification of Objection Are Fatally Defective for the Further and Independent Reason that All of the Allegations Therein Contained Are Made Upon Information and Belief.*

The specifications of objection (Tr. 12) consist *entirely* of allegations made upon information and belief. This is a *substantive* defect.

In re White, 222 Fed. 688.

In re Thomas, 92 Fed. 912.

This, then, is the state of the record. There is a complaint, or specifications of objection, which does not state a cause of action, or objection, first, because the capacity of the objecting party is not shown, and secondly, because all of its allegations are upon information and belief; and it is axiomatic that a valid judgment cannot be predicated upon a void complaint.

There is absolutely no evidence that the trustee was in fact authorized by a vote of the creditors in a legally constituted meeting called for that purpose, as is very clearly required by Section 14b of the act. And lastly, there is the objection of the bankrupt made at the inception of the hearing that the matter should not be proceeded with because the opposing party had no standing

in court. In view of these matters not only is the decision of the District Court granting the discharge correct; any other decision would have been impossible.

## V.

**THE CLAIMED FALSE STATEMENT WAS FURNISHED THE BANK OF CALIFORNIA SIXTEEN MONTHS BEFORE THE LAST EXTENSION OF CREDIT GRANTED, A PERIOD TOO REMOTE FOR IT TO HAVE BEEN REASONABLY RELIED UPON.**

So conclusive is the reason of the trustee's lack of authority to oppose this discharge for its granting that the question of the merits of the case has to a certain extent been minimized. The bankrupt is, however, from the point of view of the evidence alone, clearly entitled to his discharge.

Two charges were made. First, that the bankrupt obtained money from the Bank of California by virtue of a materially false statement in writing; and, secondly, that he destroyed, concealed, or failed to keep books of account with intent to conceal his financial condition.

The bankrupt opened his account with the Bank of California on April 19, 1913, by borrowing \$10,000, for which he gave his promissory note payable in ninety days, then furnishing them, as the Referee found, although the evidence was conflicting, with a statement of his financial condition as it existed on December 31st, 1912 (Tr. 102). On July 18, 1913, he went to the bank,

executed a new note for \$10,000 payable in ninety days, drew his check for \$10,000, with which he paid his old note, which was returned to him marked "Paid" (Tr. 102, 103). On October 18, 1913, this transaction was repeated, and was likewise repeated January 20, 1914, and April 20, 1914 (Tr. 103). The last note was executed on April 20 1914, sixteen months after the date of the written statement, which was December 31, 1912.

Incidentally the evidence shows that the written statement was not referred to or relied on when the bankrupt executed his fifth and last note on April 20, 1914 (Testimony of Mr. Moulton, 103). But even if the statement had been referred to and had been relied on, it cannot be interposed as a bar to a discharge, irrespective of its falsity, for the reason that a creditor has no right to rely on a statement so remote.

In re Mintzer (D. C. N. Y.) 197 Fed. 647.

In re Braverman, 199 Fed. 863.

In re Allendorf (D. C. Iowa) 129 Fed. 981.

In re O'Callaghan (D. C. Mass.) 199 Fed. 662.

*A. On Each of the Five Occasions that the Bankrupt Executed His Note to the Bank of California for \$10,000 a New and Separate Loan Was Negotiated. On Each Occasion There Was a Further Extension of Credit for a Definite Time. These Five Notes Cannot Be Regarded As One Transaction.*

In re Waite (D. C. Md.) 223 Fed. 853.

This case establishes the converse of the proposition.



The bankrupts were clients of the National City Bank, This combined with the First National Bank, who thus acquired \$22,500 of the bankrupts' paper. *Prior* to the merger the bankrupts had never had any business dealings with the First National. *After* the merger the notes were renewed from time to time, something always being paid on account of the principal, so that the amount due at the time of the bankruptcy was less than the amount due at the time of the merger. From time to time after the merger the bankrupts furnished the First National Bank with written statements which were false. A few days before a note became due the bankrupts would execute a new note and then pay their old note with a check.

The Court denied the bankrupts their discharge, holding that each time a new note was negotiated it was a *separate* and *new* extension of credit, the obtaining of which by virtue of a false statement in writing was such as would bar a discharge, and refused to accept the contention that the whole transaction was in effect one loan.

In the case at bar, the dealings of the bankrupt with the Bank of California cannot be regarded as one loan, but must be considered as five separate transactions; five separate and distinct extensions of credit, *the last of which was on April 20, 1914, sixteen months after the claimed false written statement of December 31, 1912, a period, as stated, too remote to have been reasonably relied upon.*

## VI.

THE EVIDENCE AS TO THE FALSITY OF THE  
STATEMENT IS INSUFFICIENT TO WARRANT THE  
FINDINGS OF THE REFEREE.

The specifications of objection allege that the whole of the written statement was false (Tr. 15). There was no attempt to prove the falsity of any of the items save and excepting the liabilities and the value of the merchandise in stock (Tr. 13). The objection was made that the specifications were not specific enough (Tr. 101), which was overruled. So the bankrupt accepted the issue that the whole of the statement was false. Yet there was no attempt to prove the falsity of any but the two items mentioned, namely, the value of the stock in trade and the liabilities.

As to those two items, the evidence, or at least many essential links, upon which the Referee basis his findings as to falsity, consists of *the uncorroborated testimony of a single witness positively denied by the bankrupt*.

In view of the fact that in order to establish his claim the trustee must prove all of the essential elements of obtaining money under false pretenses, which obtaining money from a bank by virtue of a false statement in writing would be

People vs. Haynes, 11 Wend (N. Y) 565.

Penal Code of California, sec. 532,

and in view of the fact that the evidence barring a dis-

charge in bankruptcy must be "clear and satisfactory," "strict," "convincing,"

Hardee vs. Swafford Bros. (C. C. A.) 165 Fed. 588, 590.

In re Howden, 111 Fed. 723, 725.

In re Chamberlain, 125 Fed. 629, 630,  
it has been held, that in a proceeding in opposition to a bankrupt's discharge, where the offense charged contains all of the elements of a crime, the uncorroborated evidence of a single witness, when denied, is not sufficient to overcome the presumption of innocence.

Troder vs. Lorsch (C. C. A.) 150 Fed. 710.

"When a person is charged with all the elements which constitute a heinous crime, although it be only in a civil issue, it shocks the judicial mind to refuse to give him the benefit of the usual presumption of innocence unless the adverse proofs are so far satisfactory as to be convincing.

"If there were a criminal proceeding the court, in accordance with the usual rule of one witness with unsupported testimony against that of another, would direct the jury that each was neutralized and that acquittal must follow. Although this is not a criminal proceeding, it strikes us that such is the result with the testimony of these two witnesses under the circumstances and the characteristics we have explained."

This decision is the leading case upon the subject and has been cited and approved in

Pennell vs. United States, 162 Fed. 64, 74.

In re Chamberlain, 180 Fed. 304, 307.

Remmers vs. Merchants National Bank, 173 Fed. 484, 488.

Garry vs. Jefferson Bank, 186 Fed. 461, 463.



## VII.

**THE OBJECTION OF FAILURE TO KEEP BOOKS WITH INTENT TO CONCEAL FINANCIAL CONDITION CANNOT BE RELIED ON BECAUSE OF THE MANNER IN WHICH IT IS PLEADED.**

The allegations follow the wording of the statute exactly and are as follows:

“That said bankrupt with intent to conceal his financial condition has destroyed, concealed or failed to keep books of account or records from which his financial condition might be ascertained.” (Tr. 15).

Allegations in the mere words of the statute are insufficient.

Remington on Bankruptcy, Sec. 2608.

In re Milgraum & Ost, 129 Fed. 827, 829.

## VIII.

**THAT THE BANKRUPT FAILED TO KEEP BOOKS OF ACCOUNT WITH INTENT TO CONCEAL HIS FINANCIAL CONDITION WAS FAR FROM PROVEN.**

There was no attempt to prove either destruction or concealment. To prove failure to keep proper books of account counsel for the trustee called Mr. Lester Herick, a certified public accountant, and asked him if, from certain account books lying on a table, which he had previously examined the bankrupt's financial condition could be ascertained. To this the bankrupt objected on the

ground that the books in question had not been shown to be his books of account.

Counsel for the trustee then called the bankrupt and asked him if those were his books of account. He answered that those were some of them, but that there were many, many others (Tr. 52). Counsel then called Miss Wichman, who was the bankrupt's bookkeeper and stenographer at the time of the bankruptcy, and asked her if those were the bankrupt's books. She answered that she did not remember very much about it, but at least the cash book was missing (Tr. 108). It also materialized that for two months previous to the trustee's going into possession the bankrupt's place of business had been under attachment with a keeper in charge (Tr. 108).

Objection to all of the testimony concerning books of account was then *sustained* by the Referee, but was taken for the record.

Notwithstanding that these books of account never were shown to be the books of account of the bankrupt, and notwithstanding his ruling, which was never changed, the Referee rendered a report to the effect that the bankrupt failed to keep books of account with intent to conceal his financial condition.

To prove intent there was nothing. The bankrupt testified fully as to his system of accounts (Tr. 52), which he had used continuously since the year 1900, and the fact that he had used the same system so long, a period

of fourteen years, entirely negatives any fraudulent intent.

In re Idzall, 96 Fed. 314, 316.

The Referee also decided that the bankrupt was not to be excused for failing to account for the absence of books which he claims to have had immediately preceding the bankruptcy.

In the first place this is not the law. It will not be presumed that proper books of account were not kept because the books are not found.

In re Cantor, 26 Am. Ban. Rep, 859, 864.

Collier on Bankruptcy (9th) Page 349.

In the second place in the fact that he had been out of possession of his place of business for two months before his bankruptcy, a keeper being in charge under a writ of attachment (Tr. 108), he did account for their absence.

So much for the claimed "merits of the case," "mis-carriage of justice" and other similar phrases one finds in the appellant's brief.

A loan made on a claimed false statement rendered fifteen months before the credit was extended and which not even the bank officials themselves say they referred to or relied on (Tr. 103).

A statement alleged to be false *in toto* and yet of which only two items were attempted to be proven false, and



those by self contradictory uncorroborated testimony absolutely denied by the bankrupt.

A finding of failure to keep books of account with intent to conceal financial condition based upon evidence which even the Referee himself sustained objection to, and in the face of evidence that the same system had been employed for fourteen years.

Specifications absolutely worthless for several reasons and upon which a valid judgment denying a discharge never could possibly have been based.

An objection made at the very beginning of the hearing as to the trustee's right to prosecute the opposition which there was absolutely no excuse for overruling.

"Merits of the case" and "miscarriage of justice" indeed. The only miscarriage of justice was in putting the bankrupt to a long and bitterly contested trial which never should have taken place. The judgment should be affirmed.

Dated, Oakland, California, October 15th, 1917.

Respectfully submitted,

WILDER WIGHT,

Attorney for Bankrupt and  
Appellee.

United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

Transcript of Record.

(IN THREE VOLUMES.)

---

WILSON & WILLARD MANUFACTURING  
COMPANY, a Corporation,

Appellant,

vs.

UNION TOOL COMPANY, a Corporation, ED-  
WARD DOUBLE, ROSA EICHENHOFER,  
as Administratrix of the Estate of FRIED-  
RICH EICHENHOFER, Deceased, and  
GEORGE L. CHADDERDON,

Appellees.

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VOLUME I.

(Pages 1 to 320, Inclusive.)

---

Upon Appeal from the United States District Court  
for the Southern District of California,  
Southern Division.

---

Filed

MAY 13 1917





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

**Transcript of Record.**  
**(IN THREE VOLUMES.)**

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WILSON & WILLARD MANUFACTURING  
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**VOLUME I.**  
**(Pages 1 to 320, Inclusive.)**

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*In the United States District Court, Southern District of California, Southern Division.*

IN EQUITY—CIR. CT. No. 1540.

UNION TOOL COMPANY et al.,

Complainants,

vs.

WILSON & WILLARD MANUFACTURING  
COMPANY,

Defendant.

**Citation.**

United States of America,—ss.

To Union Tool Company, Edward Double, Rosa Eichenhofer, as Administratrix of the Estate of Friedrich Eichenhofer, Deceased, and George L. Chadderdon, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 20th day of August, A. D. 1916, pursuant to an order allowing an appeal, entered in the clerk's office of the District Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, in that certain suit in equity, Cir. Ct. No. 1540, wherein you are complainants and appellees, and Wilson & Willard Manufacturing Company is the defendant and appellant, to show cause, if any there be, why the order or decree of said Court made and entered July 1st, 1916, against said appellant, in the said order allowing appeal mentioned, should not be corrected and



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speedy justice should not be done to the parties in that behalf. [7\*]

WITNESS, the Hon. BENJAMIN F. BLEDSOE, United States District Judge for the Southern District of California, Ninth Judicial Circuit, this 26 day of July, 1916.

BLEDSOE,  
United States District Judge for the Southern District of California.

Without waiving any objections as to time, etc., receipt of a copy of the within Citation is hereby admitted this 1st day of August, 1916.

FREDERICK S. LYON,  
Solicitor and of Counsel for Complainants. [8]

[Endorsed]: In Equity—Cir. Ct. No. 1540. United States District Court, Southern District of California, Southern Division. Union Tool Co. et al., Complainants, vs. Wilson & Willard Mfg. Co., Defendant. Citation. Filed Aug. 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [9]

---

**Names and Addresses of Attorneys.**

For Appellant:

RAYMOND IVES BLAKESLEE, Esq., 728—  
30 California Building, Los Angeles, California.

For Appellees:

FREDERICK S. LYON, Esq., 504—7 Merchants  
Trust Building, Los Angeles, California.  
[10]

*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

IN EQUITY—C. C. No. 1540.

UNION TOOL COMPANY, EDWARD DOUBLE,  
ROSA EICHENHOFER, as Administratrix  
of the Estate of FRIEDRICH EICHEN-  
HOFER, Deceased, and GEORGE L. CHAD-  
DERDON,

Complainants,

vs.

WILSON & WILLARD MANUFACTURING  
COMPANY,

Defendant. [11]

*In the United States Circuit Court, in and for the Ninth Circuit, Southern District of California, Southern Division.*

IN EQUITY.

UNION TOOL COMPANY, ROSA EICHEN-  
HOFER, as Administratrix of the Estate of  
FRIEDRICH EICHENHOFER, Deceased,  
GEORGE L. CHADDERDON, and ED-  
WARD DOUBLE,

Complainants,

vs.

WILSON & WILLARD MANUFACTURING  
COMPANY,

Defendant.

**Bill of Complaint.**

To the Honorable the Judges of the Circuit Court of the United States, in and for the Ninth Circuit, Southern District of California, Southern Division:

The Union Tool Company, a corporation organized and existing under the laws of the State of California, and having its principal place of business in the city of Los Angeles in said State, and Rosa Eichenhofer, as Administratrix of the Estate of Friedrich Eichenhofer, Deceased, George L. Chadderdon and Edward Double, residents of Los Angeles, California, and citizens of the State of California, bring this their bill of complaint against defendant Wilson & Willard Manufacturing Company, a corporation, organized and existing under the laws of the State of California, having [12] its principal place of business in the city of Los Angeles, and State of California, and a citizen of the State of California, and thereupon your orators complain and say:—

I.

That heretofore and prior to the 26th day of October, 1901, your orator Edward Double, then of Santa Paula, in the State of California, was the original, first and sole inventor of a certain new and useful underreamer, not known or used by others before his invention or discovery thereof, or patented or described in any printed publication in the United States of America, or any foreign country, before his invention or discovery thereof, or more than two years prior to his application for letters patent thereon in the United States of Amer-



ica, or in public use or on sale in the United States of America for more than two years prior to such application for letters patent therefor, and not abandoned.

## II.

That said Edward Double, so being the first and sole inventor of the said underreamer, heretofore, to wit, on the 26th day of October, 1901, made due application in writing in due form of law, to the Commissioner of Patents of the United States of America, in accordance with the then existing laws of the United States of America in such case made and provided, and complied in all respects with the conditions and requirements of said laws.

## III.

That all the requirements of law and of the rules of the United States Patent Office, in such case made and provided, having been fully complied with, and upon due proceedings had in said patent office of the United States, in full [13] accordance with the then existing laws and rules of the United States Patent Office, relating to the grant and issuance of letters patent for invention, and after due examination made by the Commissioner of Patents as to the novelty and patentability of the said invention, as required by law, and the aforesaid invention or underreamer having been found by the Commissioner of Patents to be new, novel, useful and patentable under said laws and the rules of the United States Patent Office, on the 28th day of July, 1903, Letters Patent of the United States of America numbered 734,833, signed, sealed and executed in

due form of law, and bearing date the day and year aforesaid, were granted, issued and delivered by the Commissioner of Patents of the United States of America, to the said Edward Double, whereby there was granted and secured to the said Edward Double, his heirs, legal representatives and assigns, for the term of seventeen years from and after the said 28th day of July, 1903, the exclusive right and liberty of making, using and vending to others to be used, the said underreamer throughout the United States and the territories thereof, as by said original letters patent or a duly certified copy thereof, to be here in court produced as may be required, will more fully and at large appear.

#### IV.

That by an instrument in writing bearing date the 4th day of February, 1902, the said Edward Double sold, assigned, transferred and set over unto the Union Oil Tool Company, its successors and assigns, an undivided one-half part of the legal title to said invention of said Edward Double in underreamers and in and to the letters patent of the United States to be granted therefor, which said instrument was duly recorded in the United States Patent Office on the 2d day of February, [14] 1903, in Liber H, 66 of "Transfers of Patents," on Page 495; as by said original instrument with the certificate of recording thereto affixed, or a duly certified copy thereof to be here in court produced as may be required, will more fully and at large appear.

That by an instrument in writing bearing date on the 16th day of January, 1903, the said Edward



Double granted to the Union Oil Tool Company, a license and liberty of making, using and vending to others to be used, underreamers embodying the said invention or improvement set forth in and secured by said letters patent numbered 734,833 and agreed in said instrument that the said Union Oil Tool Company, should have the exclusive right and liberty of making, using and vending to others to be used, underreamers embodying and containing the invention or improvement covered by the said letters patent numbered 734,833 so long as said Edward Double was connected with the said Union Oil Tool Company, as stockholder therein and an officer thereof, which said instrument was duly recorded in the United States Patent Office on the 2d day of February, 1903, in Liber H, 66 of "Transfers of Patents," on Page 496; as by said original instrument with the certificate of recording thereto attached, or a certified copy thereof, to be here in court produced as may be required, will more fully and at large appear.

That said Edward Double is now and has been continuously since the granting of the said license, a stockholder and an officer of the said Union Oil Tool Company; that by an instrument in writing bearing date the 4th day of February, 1902, the said Union Oil Tool Company sold, assigned, transferred and set over unto Friedrich Eichenhofer, George C. Gilson and George L. Chadderdon, an undivided one-half interest [15] in and to said invention of Edward Double and the said letters patent numbered 734,833, to be granted and issued therefor, which said



instrument has been duly recorded in the United States Patent Office as by said instrument, with certificate of recording thereto affixed, or a duly certified copy thereof, to be here in court produced as may be required, will more fully and at large appear.

That heretofore, to wit, on the 4th day of February, 1902, by an instrument in writing, the said Friedrich Eichenhofer, George C. Gilson and George L. Chadderdon, did grant unto the said Union Oil Tool Company, its successors and assigns, the exclusive right and liberty of making, using and vending to others to be used underreamers embodying the said invention of the said Edward Double in so far as the same was owned or held by the said Friedrich Eichenhofer, George C. Gilson, and George L. Chadderdon.

That heretofore, to wit, on or about May 25th, 1909, the said Friedrich Eichenhofer died; that at the time of the death of said Friedrich Eichenhofer he was a resident of the city of Los Angeles, county of Los Angeles, State of California; that thereafter and upon due proceedings had in the Superior Court of the State of California, in and for the county of Los Angeles, complainant, Rosa Eichenhofer, was appointed by said Superior Court of the State of California as Administratrix of the estate of Friedrich Eichenhofer, with the last will and testament of said Friederich Eichenhofer annexed; that the last will and testament was duly admitted to probate by said Superior Court in the State of California, and that said Rosa Eichenhofer has duly qualified as Administratrix of the said estate of said Friedrich Eichen-

hofer, deceased, and is now the executrix of said estate. [16]

## V.

That by an instrument in writing bearing date the 7th day of November, 1903, the said George C. Gilson, sold, assigned, transferred and set over unto the said Union Oil Tool Company, all his, the said George C. Gilson's right, title and interest in and to said Letters Patent No. 734,833, and all his, said George C. Gilson's right, title and interest, claim and demand of whatsoever nature, in, under, to and by said license, contract or agreement bearing date the 4th day of February, 1902, between Friedrich Eichenhofer, George C. Gilson and George L. Chadderdon, on the one part, and the said Union Oil Tool Company on the other part, which said instrument has been duly recorded in the patent office of the United States; as by said instrument, with the certificate of recording thereto attached, or a duly certified copy thereof, to be here in court produced as may be required, will more fully and at large appear.

## VI.

Your orators further show unto your Honors that the said Union Oil Tool Company, hereinbefore referred to, was a corporation organized and existing under the laws of the State of California, having its principal place of business in the city of Los Angeles, in said State, and did thereafter, to wit, on or about August 1st, 1908, by an instrument in writing, sell, assign, transfer and set over unto your orator Union Tool Company, all its right, title and interest in and to the said letters patent No. 734,833,



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and in and to the aforesaid instruments in writing  
and licenses hereinbefore set forth. [17]

## VII.

That the said underreamer set forth, described and claimed in said letters patent No. 734,833 has gone into great and general use and has displaced all other underreamers or tools for said use from the market and become the underreamer in general use in underreaming wells, and that the exclusive rights of your orators in and under said letters patent No. 734,833 have been generally respected and acknowledged by the trade and by users of such tools, and the validity of the said letters patent, and the title of your orators thereto, have been generally acknowledged and acquiesced in by all manufacturers, the trade and users of the said tool, and save for the infringement thereof by the defendant herein named your orators have and do now enjoy and possess the exclusive right and liberty of making, using and vending the said underreamers, and but for the wrongful and unlawful acts of the defendant herein named your orators would now be in the possession and enjoyment of the exclusive right and liberty of so making, using and vending to others to be used the said invention and underreamer; and your orators further show unto your Honors that the exclusive right and liberty of making, and using and vending the said patented invention is of great value and advantage to these complainants, and your orators have been, and but for the wrongful and unlawful acts of the Defendant herein named, would be re-



ceiving great advantages, benefits and profits therefrom.

### VIII.

Your orators further show unto your Honors, that all underreamers manufactured, sold or used by your orators, since the day of the date of the grant, issuance and delivery of the said letters patent, have been plainly marked by your [18] orators with the word "Patented," together with the day and date of the grant and issuance of said letters patent; and your orators further show unto your Honors that the said defendant has had full, complete and personal knowledge of, and has been notified in writing, prior to the filing of this Bill of Complaint, of your orators rights under said letters patent, and has been notified in writing that the acts of said defendant, herein referred to, in making, using and vending to others to be used underreamers embodying and containing said invention set forth and claimed in said letters patent, are in violation and infringement of the exclusive rights of your orators under said letters patent, and defendant has been requested to refrain and desist therefrom but has refused so to do, but has continued to manufacture, use and sell underreamers embodying and containing said invention set forth and claimed in said letters patent after full knowledge of the rights of your orators under said letters patent.

### IX.

Your orators further show unto your Honors that since the grant, issuance and delivery of said letters patent to your orator and your orator's assignors, as

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set forth, the defendant, well knowing the facts hereinbefore set forth, and having full notice of the rights of your orators in the premises and against the will of your orators, without the license or authority of your orators or of either of your orators, and in violation of said exclusive rights and liberties granted and secured to your orators by the said letters patent, has been and is now within the Southern District of California aforesaid, constructing and using and causing to be constructed and used, underreamers containing and embodying the invention [19] set forth, described and claimed in the letters patent, and intends and threatens to continue so to do, but as to how many or to what extent exactly, your orators do not know and have not been informed, but pray discovery thereof; that by reason of said violation and infringement of the exclusive rights of your orators under the said letters patent by the said defendant, your orators have been and are being deprived of large profits and advantages which might and otherwise would accrue to the benefit of your orators, and the said wrongful infringing acts of the defendant have been and are now causing your orators great and irreparable damage; and your orators show unto your Honors that they have suffered damage thereby in the full sum of One Hundred Fifty Thousand Dollars (\$150,000) as near as your orators can now estimate the same.

### X.

For as much as your orators can have no adequate relief except in this court, where matters of this kind are properly cognizable and relievable, to the end



therefor, that the defendant may, if it can, show why your orators should not have the relief hereby prayed, and make full disclosure and discovery of all the matters aforesaid, according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged, but not under oath, an answer under oath hereby being expressly waived.

## XI.

And that the defendant may be decreed to account for and pay over unto your orators, the profits thus unlawfully derived from the violation of your orators' rights, and [20] damages sustained by your orators by reason of such violation and infringement of your orators' rights, and be restrained from any further violation of said rights, your orators pray your Honors may grant a writ of injunction, issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining the said defendant, Wilson & Willard Manufacturing Company, its officers, directors, agents, servants, attorneys and workmen, and each and every of them, from any further construction, sale or use in any manner, of said patented invention, or any part thereof, in violation of your orators' rights as aforesaid; and that the underreamers now in the possession or use of the said defendant, Wilson & Willard Manufacturing Company, or under its control, may be destroyed under order of this Court; and that your Honors upon the rendering of the decree above prayed, may assess, or cause to be assessed, in addition to the profits to be



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accounted for as aforesaid, the damages your orators have sustained by reason of such infringement, and that your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment under the circumstances of the willful and unjust infringement by said defendant as herein set forth; and your orators further pray that a provisional or preliminary injunction be issued out of and under the seal of this Honorable Court, enjoining and restraining the defendant, Wilson & Willard Manufacturing Company, its officers, directors, agents, servants, attorneys and workmen and each and every of them, during the pendency of this suit, from any further infringement of said letters patent, and for such other and further relief as the equity of the case may require and to your Honors may seem meet. [21]

May it please your Honors to grant unto your orators not only a writ of injunction conformable to the prayer of this bill of complaint, but also a writ of subpoena of the United States of America, directed to the said Wilson & Willard Manufacturing Company, commanding it on a day certain to appear and answer unto this bill of complaint and abide and perform such order and decree in the premises as the court may deem proper and be required by the principles of equity and good conscience.

FREDERICK S. LYON,  
Solicitor and of Counsel for Complainants, 504 Merchants Trust Company Building, Los Angeles, California.

[Endorsed]: No. 1540. United States Circuit Court, Southern District of California, Southern Division. Union Tool Company, et al., Complainants, vs. Wilson & Willard Manufacturing Company, Defendant. In Equity. Bill of Complaint. Filed Feb. 7, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainants. [22]

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**Subpoena ad Respondendum.**

*Circuit Court of the United States, Ninth Circuit,  
Southern District of California, Southern Division.*

**IN EQUITY.**

The President of the United States of America,  
GREETING: To the Wilson & Willard Manufacturing Company, a Corporation.

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Los Angeles, on the 7th day of March, A. D. 1910, to answer a bill of complaint exhibited against you in said court by the Union Tool Company, a corporation, organized and existing under the laws of the State of California, and having its principal place of business in the city of Los Angeles, in said State and Rosa Eichenhofer, as administratrix of the estate of Friedrich Eichenhofer, deceased, George L. Chadderdon, and Edward Double, residents of Los Angeles, California, the citizens of the State of California, and to do and receive what the said Court shall have consid-



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ered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, The Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 7th day of February, in the year of our Lord one thousand nine hundred and ten, and of our Independence the one hundred and thirty-fourth.

[Seal]

WM. M. VAN DYKE,  
Clerk.

By Chas. N. Williams,  
Deputy Clerk.

Memorandum pursuant to Rule 12, Supreme Court  
U. S.

YOU ARE HEREBY REQUIRED, to enter your appearance in the [23] above suit, on or before the first Monday of March, next, at the Clerk's Office of said Court pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

WM. M. VAN DYKE,  
Clerk.

By Chas. N. Williams,  
Deputy Clerk.

Clerk's Office: Los Angeles, California.

United States Marshal's Office,  
Southern District of California.

I hereby certify, that I received the within writ on the 7th day of February, 1910, and personally served the same on the 8th day of February, 1910, on Wilson and Willard Manufacturing Company, a corporation, be delivering to and leaving with E. C. Wilson, President of the Wilson and Willard Manufacturing Company, a corporation, said de-



endants named therein, personally, at the county of Los Angeles, in said district, a copy thereof.

LEO V. YOUNGWORTH,

U. S. Marshal.

By B. H. Franklin,

Deputy.

Los Angeles, February 9th, 1910.

[Endorsed]: Original. Marshal's Doc. No. 1448. No. 1540. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. In Equity. Union Tool Company, et al., vs. Wilson & Willard Manufacturing Co. Subpoena. Filed Feb. 10, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [24]

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*United States District Court, Southern District of California, Southern Division.*

IN EQUITY—No. 1540.

UNION TOOL COMPANY et al.,

Complainants,

vs.

WILSON AND WILLARD MANUFACTURING  
COMPANY,

Defendant.

**Stipulation for Substitution of Amended Answer.**

It is hereby stipulated and agreed by the solicitor and counsel for the complainants in the above-entitled suit in equity, that the annexed amended answer of the defendant may be filed in this suit *nunc pro tunc* in substitution for the answer originally interposed and now on file, as of the date of filing such original answer; and counsel for complainants

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acknowledges service of a copy of this amended answer as of the date of this stipulation; this stipulation not to abrogate or affect any admission or stipulation heretofore made by the parties hereto or either thereof.

Dated at Los Angeles, California, January 18, 1913.

FREDERICK S. LYON,

Solicitor and Counsel for Complainants. [25]

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*United States District Court, Southern District of  
California, Southern Division.*

IN EQUITY—No. 1540.

UNION TOOL COMPANY et al.,

Complainants,

vs.

WILSON AND WILLARD MANUFACTURING  
COMPANY,

Defendant.

**Amended Answer of Defendant.**

This defendant, now and at all times saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the errors or uncertainties or other imperfections in said bill of complaint contained, for answer thereto or unto so much of such parts thereof as said defendant is advised is, or are, material for it to answer unto, says as follows:

1. Upon information and belief, defendant denies that prior to the 26th day of October, 1901, the said Edward Double was the original or first or sole

inventor of any new or useful invention in under-reamers as alleged in said bill; says that it is not true that said alleged invention was not known or used by others before his alleged invention or discovery thereof, and not patented or described in any printed publication in the United States of America, or any foreign country before his alleged invention or discovery thereof, or for more than two years prior to his application for letters patent thereon in the United States of America; and says that it is not true that the same has not, at the time of his application for patent therefor, been in public use or on sale in the United States for more than two years prior to such application for letters patent therefor, and not abandoned. [26]

2. Defendant is not informed, except by said bill of complaint, whether said complainant, Edward Double, did on the 26th day of October, 1901, make due application in writing, in due form of law, to the Commissioner of Patents of the United States of America, in accordance with the then existing laws of the United States of America in such case made and provided; or whether he complied in all respects with the conditions and requirements of said laws, and leaves complainants to make such proof thereof as they may.

3. Defendant is not informed, except by said bill of complaint, whether due proceedings were had in said Patent Office of the United States, in full accordance with the then existing laws and rules of the United States Patent Office relating to the grant and issuance of letters patent for inventions, or whether



after due examination made by the Commissioner of Patents as to the novelty and patentability of said invention, as required by law, the aforesaid invention or underreamer was found by the Commissioner of Patents to be new or novel, or useful or patentable under said laws and the rules of the United States Patent Office; or whether letters patent of the United States of America, numbered 734,833 or otherwise numbered, signed or sealed or executed in due form of law, or bearing date the day and year above mentioned, were granted or issued or delivered by the Commissioner of Patents of the United States of America to the said Edward Double, his heirs, legal representatives or assigns, and leaves the complainants to make such proof thereof as they may; and denies that the said letters patent granted to the said Edward Double, his heirs or legal representative or assigns, for the term of seventeen years from and after the said 28th day of July, 1903, or for any other term, the exclusive right or liberty, or any right, or any liberty, of making, using or vending to others to be used, the said underreamer throughout [27] the United States and the territories thereof, or any right whatever.

4. Defendant is not sufficiently informed whether the said Edward Double, by an instrument in writing bearing date the 4th day of February, 1902, or other date, assigned or transferred or set over unto the Union Oil Tool Company, its successors or assigns, an undivided one-half or any part of the legal title to said alleged invention of said Edward Double in underreamers, and in and to the letters patent of the

United States to be granted therefor, or whether said written assignment includes the right to sue for and collect damages for the unauthorized use of said alleged invention, and leaves complainants to make such proof thereof as they may.

5. Defendant is not sufficiently informed whether the said Edward Double, by instrument in writing bearing date the 16th day of January, 1903, or other date, granted to the Union Oil Tool Company the license and liberty of making or using, or vending to others to be used, underreamers embodying the said invention or improvement, set forth in and secured by said letters patent numbered 734,833; or whether said written assignment granted to said Union Oil Tool Company any exclusive rights in said invention or patent, or any exclusive right or liberty of making, or using, or vending to others to be used, underreamers embodying and containing the invention or improvement covered by the said letters patent numbered 734,833, or whether said written assignment includes the right to sue for and collect damages for the unauthorized use of said alleged invention, and leaves the complainants to make such proof thereof as they may.

6. Defendant is not sufficiently informed whether said Edward Double is now and has been continuously since the granting of said license on the 16th day of January, 1903, a stockholder and an officer of the said Union Oil Tool Company, [28] and leaves the complainants to make such proof thereof as they may.

7. Defendant is not sufficiently informed whether



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the said Union Oil Tool Company sold, assigned, transferred or set over unto Friedrich Eichenhofer, George C. Gilson and George L. Chadderdon, or any of them, an undivided one-half interest in and to the said invention of the said Edward Double, and the said letters patent numbered 734,833 to be granted and issued therefor, or whether the said written assignment includes the right to sue for and collect damages for the unauthorized use of said alleged invention; and leaves the complainants to make such proof thereof as they may.

8. Defendant is not sufficiently informed whether the said Friedrich Eichenhofer, George C. Gilson and George L. Chadderdon, by instrument in writing dated the 4th day of February, 1902, or other day, did grant unto the said Union Oil Tool Company, its successors and assigns, the exclusive right or liberty of making, using and vending to others to be used, underreamers embodying the said invention of the said Edward Double, in so far as the same was owned or held by the said Friedrich Eichenhofer, George C. Gilson and George L. Chadderdon, or any right or liberty or in said invention or said patent; or whether said instrument was duly recorded in the Patent Office of the United States, and leaves the complainants to make such proof thereof as they may.

9. Defendant is not sufficiently informed whether said George C. Gilson, by an instrument in writing bearing date the 7th day of November, 1903, sold or assigned or transferred or set over unto the said Union Oil Tool Company, all his, the said George C. Gilson's right, title and interest in and to the said



letters patent numbered 734,832, or what right or what title the said George C. Gilson sold or assigned or transferred or set [29] over unto the said Union Oil Tool Company and leaves the complainants to make such proof thereof as they may.

10. Defendant is not sufficiently informed whether the said Union Oil Tool Company, by instrument in writing, assigned to complainant Union Tool Company all the right, title and interest in said invention or patent, or whether said written assignment includes the right to sue for and collect damages for the unauthorized use of said alleged invention, or whether said instrument was duly recorded in the Patent Office of the United States, and leaves the complainants to make such proof thereof as they may.

11. Upon information and belief defendant denies that the said underreamer set forth, described and claimed in said letters patent No. 734,833, has gone into great and general use, or great or general use; denies that the alleged rights of complainants under said letters patent No. 734,833 have been generally respected and acknowledged, or respected or acknowledged by the trade and by the users of such tools, or by the trade or by the users of such tools, and denies that the validity of said letters patent and the title of complainants thereto have been generally acknowledged and acquiesced in by all manufacturers, the trade, and users of said tool, or by the manufacturers or the trade or the users of said tool. Defendant denies that the said underreamer set forth, described and claimed in said letters patent No. 734,-

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833, has displaced all other underreamers or tools for said use from the market, and denies that the same has become the underreamer in general use in underreaming wells.

12. Upon information and belief defendant denies that save for the alleged infringement of the said invention claimed in said letters patent by the defendant herein, said complainants or any of them have and do now enjoy and possess, or have or do now enjoy or possess, the exclusive right and liberty, or any [30] exclusive right, or any liberty of making, using and vending to others to be used, or making or using or vending to others to be used, said invention and underreamer, or said invention or said underreamer. Defendant denies that said patented invention is of great value and advantage, or any value or any advantage to said complainants or any of them.

13. Defendant denies that at the time alleged in said bill of complaint, or at any time, it did make, use or vend underreamers containing and embodying the, or any, invention set forth and covered by said letters patent No. 734,833 therein sued upon, or that it has in any way infringed upon the exclusive rights, or any rights, of the complainants or any of them, or intended or intends so to infringe. Defendant denies that complainants or any of them are or have been deprived of any advantages, benefits and profits, or advantages or benefits or profits, by any wrongful or unlawful acts of said defendant, and denies that but for the wrongful and unlawful, or wrongful or unlawful, acts of defendant said complainants or any



of them would be receiving great advantages, benefits and profits, or any advantages or any benefits or any profits from said alleged invention.

14. Defendant is not sufficiently informed whether all the underreamers manufactured, sold or used by complainants since the day of the grant, issuance and delivery of said letters patent, have been plainly marked by said complainants or any of them with the word "Patented" together with the day and date of the grant and issuance of said letters patent, and leaves the complainants to make such proof thereof as they may. Defendant denies that after being requested to refrain and desist therefrom it has continued to manufacture, use, and sell, or manufacture or use or sell, underreamers embodying and containing, or embodying or containing, said or any invention set forth and claimed [31] in said letters patent.

15. Defendant denies that at any time since the grant, issuance and delivery of said letters patent No. 734,833 the defendant, well knowing the facts alleged in said bill of complaint, and having full notice of the rights of said complainants in the premises and against the will of said complainants, without the license or authority of said complainants or of either of them, and in violation of said exclusive rights or liberties, or in violation of any exclusive rights or any liberties, or in violation of any rights or any liberties, granted or secured to complainants or any of them by said letters patent, has been and is now, or at all times has been or is now, within the southern district of California, or at any other place, con-



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structing and using and causing to be constructed and used, or constructing or using or causing to be constructed and used, underreamers containing and embodying, or containing or embodying the, or any, invention set forth, described and claimed in the said letters patent No. 734,833, and denies that it intends and threatens, or intends or threatens, to continue so to do.

16. Defendant denies that at any time since the grant, issuance and delivery of said letters patent No. 734,833 and prior to the filing of the bill of complaint herein it well knew or now knows, save from said bill of complaint, the facts therein stated or the claims therein asserted by complainants, and denies that at any of said times it had full or any notice of the alleged rights of complainants or any of them in the premises. Denies that defendant at any time since the grant of said letters patent, or at any time, has been or now is, within the southern district of California, or at any other place, constructing and using and causing to be constructed and used, or constructing or using or causing to be constructed or used, underreamers containing and embodying, or containing or embodying the, [32] or any, invention set forth, described and claimed in the said letters patent No. 734,833, and denies that it intends and threatens, or intends or threatens, to continue so to do.

17. Defendant denies that by reason of said alleged violation or infringement of the exclusive rights of complainants or of any rights under the said letters patent No. 734,833, by the said defendant,

said complainants or any of them have been and are, or have been or are, being deprived of large profits and advantages, or any profits of any advantages which might and otherwise would, or might or otherwise would accrue to the benefit of complainants or any of them. Defendant denies that said alleged wrongful infringing acts or any wrongful or any infringing acts of the defendant have been and are, or have been or are now causing complainants or any of them great and irreparable, or great or irreparable, or any damage; and denies that said complainants or any of them either jointly or severally have suffered damage by reason of the, or any, wrongful or infringing acts or acts of defendant in the full sum of \$100,000, or in any other sum.

18. Upon information and belief defendant says that complainants have, and each of them has, full and adequate relief at law, and that this Court as a court of equity has no jurisdiction.

19. Upon information and belief defendant says that the alleged invention, and the subject of each of the eight several claims of invention and the combinations of parts and elements specified therein, of said letters patent No. 734,833, were without patentable novelty or invention when said Double filed his application for said letters patent, as more particularly hereinafter set forth. Defendant further says that the said Edward Double was not the original, sole and first inventor or discoverer of the invention or any part thereof purporting to be [33] covered by and patented in and by the said letters patent No. 734,833, or of any material or substantial



part thereof, all as more particularly hereinafter set forth; that the said invention, and the subjects of each of said several claims of said letters patent No. 734,833, had been in public use in this country and other countries prior to said alleged invention by said Double and prior to the date of application for said letters patent No. 734,833, all as more fully hereinafter specified; that the said invention, and the subject of each of said several claims of said letters patent No. 734,833, had been on sale in this country and other countries prior to the date of said alleged invention and the date of application of said patent No. 734,833, all as more fully hereinafter specified; that the said invention and the subject of each of said several claims had been in public use in this country and other countries for more than two years before the date of said alleged invention and the date of the application for said letters patent No. 734,833, all as hereinafter more particularly specified; that the said invention and the subject of each of said several claims of said letters patent No. 734,833, had been on sale in this country and other countries for more than two years prior to the date of the alleged invention and the date of application for said letters patent No. 734,833, all as more particularly hereinafter set forth; that the said invention and the subject of each of the several claims of said patent had been disclosed in printed publications prior to the date of the alleged invention and the date of application of said letters patent therefor No. 734,833, all as more fully hereinafter set forth; that the said invention and the subject of each of said several claims of said



letters patent No. 734,833, had been patented prior to the date of application of said letters patent No. 734,833, and the subject of each of said several claims of said letters patent No. 734,833, had been disclosed in printed [34] publications more than two years prior to said date of application of said letters patent No. 734,833, all as hereinafter more particularly set forth; and that the said invention and the subject of each of said several claims of said letters patent had been patented more than two years prior to the application for said letters patent No. 734,833, all as hereinafter more particularly set forth; and defendant specifies instances of such prior invention, use, sale, publication and patenting, as hereinabove referred to, as follows, to wit:

As to letters patent as evidencing prior inventing and patenting of the alleged invention covered by said letters patent No. 734,833, and constituting the subjects of the several claims of said invention, prior to the date of application of said letters patent No. 734,833, reference is made to the following letters patent of the United States, to wit:

Number 679,384, granted to James M. Kellerman, July 30, 1901.

Number 683,352, granted to J. C. Swan, September 24, 1901.

Number 674,793, granted to Edward North, May 21, 1901.

Number 496,317, granted to Patrick H. Mack, April 25, 1893.

Number 403,877, granted to Jeremiah E. Day, May 21, 1889.

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Number 475,913, granted to Patrick Yorke, May 31, 1892.

Number 526,440, granted to J. Deisch, September 25, 1894.

Number 344,744, granted to M. A. Lloyd, June 29, 1886.

Number 647,605, granted to Charles A. Mentry, April 17, 1900.

Number 492,371, granted to Patrick H. Mack, February 21, 1893.

Number 294,302, granted to Orren Allen, February 26, 1884.

Number 439,275, granted to R. D. Hobart & M. Ahearn, Oct. 28, 1890.

Number 668,340, granted to Wm. Plotts, February 19, 1901.

Number 563,054, granted to George Palm, June 30, 1896.

Number 279,276, granted to Edward Sullivan, June 23, 1868.

Number 479,933, granted to John Carruthers, August 2, 1892.

As further instancing prior publication of said invention and of the subjects of the several claims disclosed in and patented [35] by said patent No. 734,833, reference is made to a printed book consisting of an illustrated catalogue of Oil Well Supply Company, or Pittsburg, Pennsylvania, United States of America, published by the said Oil Well Supply Company in the year 1900 and by the said Oil Well Supply Company distributed throughout the oil well fields of the United States of America and foreign



countries, and particularly to those interested in the handling, sale and operation of tools and appliances designed, and constructed for the sinking of oil wells and the extraction of oil therefrom; particular reference being made to that portion of page 117 of said printed catalogue being a pictorial representation of an underreamer displayed on said page under the caption "Underreamer Fig. 2161," and to page 82 of said printed catalogue being a pictorial representation of an underreamer displayed on said page under the captions "Austrian underreamer. Complete. Fig. 1713. Fig. 1715. Fig. 1717"; and to that portion of page 80 of said printed catalogue being a pictorial representation of an underreamer displayed on said page under the caption "Russian underreamer. Fig. 1707."

As particularly instancing the invention by another or others of the subject of said letters patent No. 734,833, and of each of the eight claims thereof, prior to the date of the alleged invention thereof, by said Double, irrespective of and apart from any of the matters and things further herein specified, and as a separate defense to the allegations of the bill of complaint herein, reference is made to letters patent No. 762,435, issued June 14, 1904, to Thomas A. O'Donnell and Arthur G. Willard, as joint inventors, upon an application filed December 8, 1899, namely, at a date and a long time prior to the date and time of application of said Double for said letters patent No. 734,833, and co-pending in the patent office with said application of said Double, whereby said O'Donnell and Willard are the true, original and joint in-



ventors and rightful patentees of the invention constituting [36] the subject of said letters patent No. 734,833, and of the eight several claims thereof.

As particularly instancing the prior manufacture, use and sale of the alleged invention patented in and by said Double Patent No. 734,833, and the subjects of the several eight claims of said letters patent No. 734,833, reference is made to an underreamer containing the subject of said letters patent No. 734,833, and the subjects of the several eight claims thereof, and which was produced, used and sold or leased, as follows, and contained in each instance likewise the invention patented and disclosed in and by said U. S. Letters Patent No. 762,435, issued June 14, 1904, to said Thomas A. O'Donnell and Arthur G. Willard, to wit:

First, a full-sized wooden model produced and completed, at the instance and order of said joint patentee O'Donnell, by Hughes Manufacturing and Lumber Company, of Los Angeles, California, during the latter part of the year 1899 or the first part of the year 1900, and shipped, at the order of said patentee O'Donnell, to Leidecker Tool Company, of Marietta, Ohio; and

Second, a full-sized working underreamer likewise embodying the invention patented in and by and disclosed by said letters patent No. 762,435, and manufactured by said Leidecker Tool Company, at said Marietta, Ohio, from and in accordance with said full-sized wooden model, at the order and instance of said patentee O'Donnell, during the latter part of the year 1899 or during the year 1900, and thereafter and

during the year 1900 and 1901 used in the Newhall oil fields near the town of Newhall, Los Angeles County, California, and in other oil fields in Los Angeles County, California, under the instructions of said patentee O'Donnell; and,

Third, a full-sized working underreamer manufactured at the order and instance of said patentee O'Donnell, and under the direction and superintendency of said patentee Willard, during the latter part of the year 1900, by the Baker Iron Works, at [37] Los Angeles, county of Los Angeles, California, and upon completion, during the latter part of the year 1900 or the first part of the year 1901, successfully operated and used for underreaming in a well of the El Moro Oil Company in the Whittier oil fields, adjacent to the city of Whittier, County of Los Angeles, California, and in other parts of said Whittier oil fields, by and under the supervision of said patentee O'Donnell; and which was subsequently successfully operated, during the year 1901, in a well at the mouth of the San Fernando tunnel in the Newhall oil fields, in the county of Los Angeles, California, by said patentee O'Donnell and one William Grant Lehman.

As further particularly instancing the prior manufacture, use and sale of the alleged invention patented in and by said Double patent No. 734,833, and of the subjects of the several eight claims of the said Double patent, reference is made to an underreamer containing the subject of said Swan letters patent No. 683,352, and which was in large numbers produced, used and sold or leased by the said Leidecker Tool Company, of Marietta, county of Washington,



State of Ohio, during the years 1899 and 1900 and 1901, and thereafter down to the present time, and which during the years 1899, 1900 and 1901 and thereafter was successfully used and operated in the oil fields of Ohio, West Virginia, Pennsylvania and California, and in the oil fields of Southern California, in and about said city of Los Angeles and the oil fields contiguous to such city, and at other places and by the following parties, to wit:

Bert Lewis Culver, of Whittier, California;

John O. Dart, of Los Angeles, California;

Columbia Oil Company at Fullerton, Orange County, California, during July, August, and the remaining portion of the year 1901 and thereafter;

Southern California Railway Company, at Olinda, Orange County, [38] California, during July and August and the remaining portion of the year 1901; and by other parties.

As further particularly instancing the prior manufacture, use and sale of the alleged invention patented in and by said Double patent No. 734,833, and of the subjects of the said eight claims of said Double letters patent, reference is made to an underreamer containing the subject of said letters patent No. 734,833, and the subject of said cut under the caption "Fig. 2161" appearing on page 117 of said illustrated catalogue of said Oil Well Supply Company, of Pittsburg, Pennsylvania, and which underreamer was in large quantities manufactured by Oil Well Supply Company, Limited, and the firm of McKenzie and Joyce, of Petrolia, Ontario, Canada, and was sold or leased by said Oil Well Supply Company,



Limited, and the firm of McKenzie and Joyce, to and used by oil well supply houses and oil well drillers and operators throughout the oil fields of Canada, Pennsylvania, Ohio, West Virginia, California, Sumatra and Borneo, during the years 1896, 1897, 1898, 1899, 1900 and 1901, and particularly by John A. Bennett, of Bakersfield, California, in the Island of Sumatra, in the years 1896, and 1897, and which was successfully used in the Midway oil field, in the County of Kern, California, by said John A. Bennett and one J. L. Bruce, of Bakersfield, California, during the years 1900 and 1901, and by other parties at other places.

As further instancing the prior manufacture, use and sale of the alleged invention patented in and by said Double patent No. 734,833, and of the subjects of the said eight claims of said Double letters patent, reference is made to an underreamer containing the subject of said letters patent No. 734,833, and the subject of said cuts Fig. 1713, 1715 and 1717 appearing on page 82, of the said illustrated catalogue of said Oil Well Supply Company, of Pittsburg, Pennsylvania, and which [39] underreamer was in large quantities manufactured by said Oil Well Supply Company, of Pittsburg, County of Allegheny, State of Pennsylvania, and by Baker Iron Works, of Los Angeles, County of Los Angeles, State of California, and others during the years 1898, 1899, 1900, 1901, and thereafter and which underreamer, known as the "Austrian" underreamer, were successfully used in large quantities in the oil fields of Ohio, West Virginia, Pennsylvania, Indiana and

California, during said last mentioned years and thereafter; and particularly by one J. M. Kellerman, of Los Angeles, California, in the Los Angeles oil fields adjacent to said city of Los Angeles, California, during the year 1898, and thereafter, and by one Bert Lewis Culver, in the Los Angeles oil fields at said Los Angeles, California, during the year 1900 and thereafter, and by others.

As further instancing the prior manufacture, use and sale of the alleged invention patented in and by said Double patent No. 734,833, and of the subjects of the said eight claims of the said Double letters patent, reference is made to an underreamer containing the subject of said letters patent No. 734,833, and the subject of said letters patent No. 734,833, and the subject of said cut "Fig. 1707" appearing on page 80 of the said illustrated catalogue of said Oil Well Supply Company of Pittsburg, Pennsylvania, and known as the "Russian underreamer" and which underreamer was in large quantities manufactured by the Bovaird and Seyfang Manufacturing Company of Bradford, McKean County, Pennsylvania, and others during the years 1896, 1897, 1898, 1899 and 1900 and thereafter, and which were used in large quantities in the oil well fields of Pennsylvania, Ohio, West Virginia, Indiana and California, and in foreign oil fields, during the years 1896, 1897, 1898, 1899, and 1900 and thereafter.

As further instancing the prior manufacture, use and sale of the alleged invention patented in and by said Double patent [40] No. 734,833, and of the subjects of the said eight claims of said Double let-



ters patent, reference is made to an underreamer containing the subjects of said letters patent No. 734,833, and the subject of said letters patent No. 679,384, granted to James M. Kellerman July 30, 1901, and which underreamer was in large quantities manufactured by said James M. Kellerman, of Los Angeles, California, and by the Union Tool Company, or its predecessors, of the complainants in this suit of equity, during the years 1899, 1900 and 1901 and thereafter, at said Los Angeles, California, and which were used by said James M. Kellerman and others, during the years 1899, 1900 and 1901 and thereafter, in the Los Angeles oil fields at said Los Angeles, California, and at Lompoc, Santa Barbara County, California, and elsewhere.

As further instancing the prior manufacture, use and sale of the alleged invention patented in and by said Double patent No. 734,833, and of the subjects of the said eight claims of the said Double letters patent, reference is made to an underreamer containing the subject of said letters patent No. 734,833, and the subject of said letters patent No. 674,793, granted to said Edward North, May 21, 1901, and which underreamer was in large quantities manufactured by said Edward North and Union Oil Tool Company, predecessors of complainants in this suit in equity, at said Los Angeles, California, during the years 1900, 1901 and 1904 and thereafter, and which was successfully operated and used, in the years 1901, 1902, 1903, 1904 and thereafter, by a large number of persons, and particularly by said Edward North at said Whittier, Los Angeles County, Cali-



fornia, in 1901, and by one J. O. Dart, in the Coalinga oil fields, County of Fresno and State of California, during the latter part of the year 1901 and the early part of the year 1902, and elsewhere, and by one Martin Barber in the Fullerton oil fields, Orange County, California, during the latter part of the year 1901 and the early part of the year [41] 1902, and elsewhere.

As further instancing the prior manufacture, use and sale of the alleged invention patented in and by said Double patent No. 734,833, and of the subjects of the said eight claims of the said Double letters patent, reference is made to an underreamer containing the subject of said letters patent No. 734,833, and the subject of said letters patent No. 668,340 granted to said William Plotts February 19, 1901, and which underreamer was in large quantities manufactured by one B. D. Tillinghast, at McDonald, County of Washington, Pennsylvania, during 1897, and from then on to the present time, and by others, and which was successfully used by said William Plotts and one Albert Schinneller, and others, at said Whittier oil fields, Los Angeles County, California, and elsewhere, in the year 1897 and from then on up to date by said William Plotts, and in the year 1900 and from then on up to date by said Albert Schinneller, and which is now in successful use in the same oil fields.

As further instancing the prior manufacture, use and sale of the alleged invention patented in and by said Double patent No. 734,833, and of the subjects of the said eight claims of said Double letters patent,

reference is made to an underreamer containing the subject of said letters patent No. 734,833, and the subject of said letters patent No. 403,877 granted to said Jeremiah E. Day, May 21, 1889, and which underreamer was in large quantities manufactured by said Jeremiah E. Day and others as follows: By said Jeremiah E. Day and one Joseph Pracy, and one Joseph Eastwood, and others, at San Francisco, County of San Francisco, California, during the years 1888, 1889 and 1890, and by one William Edwards, one J. W. Russell and one John Thompson and said Joseph Eastwood and others during the years 1892, 1893, 1894, 1895, and 1896, at said San Francisco, California, and one of which underreamers so made was successfully operated by one [42] C. W. Fox in the year 1892 in an oil well at Montague, County of Siskiyou, California, and by other and at other times elsewhere.

That a number of said underreamers herein mentioned continued to be used and successfully operated long after the issuance of said Double patent No. 734,833 and the commencement of manufacture of an underreamer known on the market as the Double underreamer, and manufactured and introduced by the Union Tool Company and its predecessor the Union Oil Tool Company, of complainants in this suit in equity, and that a number of such other kinds of underreamers herein mentioned are at the present day in successful use, and that the said underreamer patented by said Elihu C. Wilson, of the defendant company, is superior in construction and mechanical operation to the underreamer patented by and under



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said Double patent No. 734,833; and that the underreamers made in accordance with said Double patent No. 734,833, were not successful in use and are not to-day used, but the underreamer marketed by the complainant company, Union Tool Company, is an underreamer which is deficient and defective in many respects in construction and operation and is only effective to any meritorious degree because its construction employs and embodies features of the invention of said Elihu C. Wilson, of the defendant company, which was patented by him as herein set forth; and that the said Double patent No. 734,833, if it covered any invention at all, or any improvement at all, covered only a slight and almost negligible improvement in the art over and with respect to the large number of underreamers introduced and in use and reduced to practice and patented before application for such Double patent was made.

20. Defendant alleges that long prior to the filing of the bill of complaint herein and prior to the 28th day of November, 1905, one Elihu C. Wilson, then of the city of Bakersfield in the state of California, was the original, first and sole [43] inventor of a certain new and useful underreamer not known or used by others before his invention or discovery thereof, or patented or described in any printed publication in the United States of America or any foreign country before his invention or discovery thereof for more than two years prior to his application for letters patent thereon in the United States of America, or in public use or on sale in the said United States for more than two years prior to such



application for letters patent therefor, and not abandoned.

21. Defendant says that said Elihu C. Wilson so being the first and sole inventor of said underreamer heretofore, to wit, on the 28th day of November, 1905, made due application in writing, in due form of law, to the Commissioner of Patents of the United States of America in accordance with the then existing laws of the said United States in such cases made and provided, and complied in all respects with the conditions and requirements of said laws.

22. Defendant says that all the requirements of law and the rules of the said United States Patent Office in such cases made and provided having been fully complied with, and upon due proceedings had in said United States Patent Office in full accordance with the then existing laws and rules of the said United States Patent Office relating to the grant and issuance of letters patent for inventions, and after due examination made by the Commissioner of Patents of the said United States as to the novelty and patentability of the said invention as required by law, and the aforesaid invention for underreamer having been found by the Commissioner of Patents to be new, novel, useful and patentable under said laws and the rules of the said United States Patent Office, on the 31st day of July, 1906, letters patent of the United States of America numbered 827,595 signed, sealed and executed in due form of law and bearing [44] date the day and year aforesaid, were granted and issued by the Commissioner of Patents of the United States of America to the said

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Elihu C. Wilson, wherein and whereby there was granted and secured to the said Elihu C. Wilson, his heirs, legal representatives, licensees and assigns, for the term of seventeen years from and after the said 31st day of July 1906, the exclusive right and liberty of making, using and vending the said underreamer throughout the United States and the territories thereof, as by said original letters patent or a duly certified copy thereof to be here in court produced, as may be required, will more fully and at large appear.

23. Defendant says that on the 18th day of July, 1907, it was duly organized and incorporated under and by virtue of the laws of the State of California and ever since has been and now is a corporation organized and incorporated under and by virtue of the laws of said State of California, and that prior to said 18th day of July, 1907, defendant had no existence corporate or otherwise.

24. Defendant says that since the said 18th day of July, 1907, it has been constructing and causing to be constructed and used, under and pursuant to the license and authority of said Elihu C. Wilson, underreamers containing and embodying the invention set forth, described and claimed by said Elihu C. Wilson in said letters patent No. 827,595, and not containing or embodying the invention set forth, described and claimed by Edward Double in letters patent No. 734,833, and that the said construction and using, and causing to be constructed and used, underreamers under said letters patent No. 827,595, pursuant to said license, are the acts complained of by



said complainants in the bill of complaint herein.

WHEREFORE, this defendant having fully answered to the said bill of complaint in so far as it is advised the same is [45] material and necessary to be answered unto, denies that the said complainants or any of them are entitled to the relief or any part thereof in the said bill of complaint demanded, or any relief whatever; prays the same advantages to its aforesaid answer as if it had pleaded and demurred to said bill of complaint, and prays to be hence dismissed with its reasonable charges in this behalf most wrongfully sustained.

WILSON & WILLARD MFG. CO.

By ELIHU C. WILSON, Pres.

RAYMOND IVES BLAKESLEE,

HUNSAKER & BRITT,

F. A. STEPHENSON,

Of Counsel and Solicitors for Defendant.

[Endorsed]: C. C. No. 1540. U. S. District Court, Southern District of California, Southern Division. Union Tool Company et al., vs. Wilson & Willard Manufacturing Company. Stipulation and Amended Answer. Filed Jan. 20, 1913, *nunc pro tunc* as of July 9, 1910. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [46]



44 *Wilson & Willard Manufacturing Company*

*In the District Court of the United States, Southern  
District of California, Southern Division.*

No. 1540.

UNION TOOL COMPANY,

Complainant,

vs.

WILSON & WILLARD MANUFACTURING  
COMPANY,

Defendant.

**Memorandum Decision.**

Filed June 19, 1916.

FREDERICK S. LYON, for Complainant.

RAYMOND IVES BLAKESLEE, for De-  
fendant.

CUSHMAN, District Judge.

Complainant sues for the infringement of letters patent #734,833, applied for in 1901 and granted Edward Double in 1903. The patent is for a new type of underreamer covering certain combinations therein. The defense is: Want of patentable novelty and invention; anticipation; and infringement is denied.

In drilling oil wells in Pennsylvania, no underreamer was necessary, as the formation stood up and, when the rock was reached, at a depth of fifty to one hundred feet, no casing was required—casing being a pipe entered in the hole for the purpose of holding back soft earth and preventing caving.

The devices in question are a part of what is known as the "cable tool system" of oil well digging, con-

sisting of a high derrick with windlasses called "bull wheels and calf wheels" for winding up and releasing the cable rope to which the tools are attached. The hole in the ground is made by dropping a string of [47] tools. A certain amount of water is kept in the bottom of the hole, which is churned up into mud. This mud—made by the water and detritus formed by the drilling—is taken out of the hole by a *baler* *other* suitable device, which is run down inside the casing.

In drilling, ordinarily, a heavy bit is used. The bit will pass literally through the inside of the pipe, but, in playing up and down beneath the pipe, unless the formation is soft, it will cut a smaller hole than the outside diameter of the pipe, or casing. In hard formations it is, therefore, necessary that the hole underneath the casing be enlarged, or underreamed, that is, reamed out under the casing so that the casing may follow through the hole.

The device for accomplishing this is an underreamer, which, in effect, is an expansive bit that is so arranged as to expand after it has been dropped through the casing. The casing is supported a sufficient distance above the underreamer to allow of its being played up and down to cut away the hard strata by the weight behind the striking bit.

The ordinary drilling bit drills a hole through the hard ledge first, but this hole is of too small a diameter to permit of the passing of the casing. The hole is then enlarged by means of the underreamer so that the casing may fall.

In order to be a successful underreamer, the ma-



chine must be essentially strong. The thrust upon the bit must be as nearly as possible in direct line with the string of tools, to prevent breaking. The mechanism by which it expands and collapses must be dependable so as not to get out of order by reason of the heavy blows, or by reason of the mud and debris in which it has to be worked. It must not only be so arranged as to expand when it is passed down through the casing, but provision must be made by which, in pulling it up against the shoe or foot of the casing, it [48] will again be collapsed so that it can be drawn within the casing.

These are the main difficulties to be overcome in such a device, and the accomplishment of them—as the evidence shows—has been sought for many years.

The digging of oil wells in California began as far back as, about, 1890. The industry increased to a great degree in importance about 1897.

Prior to the invention of the patent in suit, the underreamers mainly used in California oil fields were known as the “Austrian” and “Russian.” With these a greater depth than 1800 feet was seldom reached. By the use of the Double underreamer a much greater depth was attained, not infrequently twice as deep as formerly.

It is claimed that this great success was not entirely owing to the new underreamer, as improvements in other ~~other~~ oil well digging devices were adopted about the same time. It is clear that much of the credit for this great accomplishment, is unquestionably due to the Double underreamer. It almost at once took the lead in the oil well tool trade



over all former reamers. There is testimony that, in the California fields, eighty-five per cent of the underreamers sold are either of the Double type or that of the alleged infringing device.

These facts, coupled with the presumption arising upon the grant of the patent, are sufficient to resolve any doubt which may exist, in this case, in favor of the validity of the patent.

*Stebler v. Riverside Heights Orange Growers Association*, 205 Fed. 735;

*Morton v. Llewellyn*, 164 Fed. 693.

It is not meant by this that patentable invention is left substantially in doubt upon an inspection of the alleged anticipating devices and the evidence concerning them, for it is not.

Upon the trial, defendant sought to establish that one Frederick W. Jones—an employee of the National Supply Company, [49] under the superintendency of Double—was really the inventor of whatever was novel in the patent in suit. Jones testified that he was, in fact, the inventor but his former conduct; his long silence, even under provocation, and testimony given by him on an interference contest in the patent office involving the Double underreamer are wholly inconsistent with his present statements.

The testimony at that hearing was given about the time of the granting of the patent in suit and was, in part, as follows:

“Q. Did you have a conversation with Mr. Double in regard to this reamer; and if so state the conversation.

“A. Well, I was employed by Mr. Double at the same time he was manufacturing the reamer in question; I had a conversation with him and he said the reamer was a mean thing to manufacture and that he would change the construction of it, and he showed me what changes he proposed to make, and he also asked me what I thought of the changes, and I told him that I thought the change was a good one. That is all.”

This so far discredits the testimony of Jones as to leave no warrant for overthrowing the presumption of regularity in the issuance of the patent, as well as plaintiff's evidence now given in support of the patent.

The main question in the case is: What range of equivalents, if any, is complainant entitled—under the patent in suit to be protected against?

Upon consideration of the prior art, including the alleged anticipating patents and devices, and the marked success in the trade and in operation of the Double underreamer, I find that it constituted combinations of decided merit, entitling complainants to a fair range of equivalents.

*Los Alamitos Sugar Co. v. Carroll*, 173 Fed. 280.

While it is true that each of the elements of the combination claims of the patent in suit were old in the art, yet the combinations, as a whole, were new.

The claims of the patent in suit in question are [50] numbered 1, 2, 6, 7 and 8 and read as follows:

“1. An underreamer comprising a hollow mandrel furnished with an internal shoulder,



a downward extension having opposite parallel bearing-faces having a key-way therein, shoulders at the sides of such extension and upwardly and inwardly sloping dovetail slipways beneath said shoulder; a spring on the shoulder in the hollow mandrel; a rod playing in the mandrel furnished with a key-seat and supported by the spring; dovetail tilt-slips playing in the slipways and furnished with key-seats respectively; a key in the key-seats of the slips and rod and playing in the key-way of said extension to hold the slips against the shoulders; said slips being furnished with inward projections to slide upon the downward extension of the mandrel to spread apart the cutting edges of the slips when the slips are drawn up.

“2. An underreamer furnished with a mandrel having a downward extension provided with opposite parallel bearing-faces and a key-way in the extension; a spring-supported rod furnished with a key-seat and playing up and down in the mandrel; tilt-slips slidingly connected with the mandrel and furnished with inward projections to slide upon the opposite bearing-faces of the downward extension to spread the slips apart at the lower ends when the slips are drawn up; and a key carried by the rod and carrying the slips.”

“6. In an underreamer, a mandrel furnished with a hollow-slotted extension, the lower end of which slopes upward at the edges; tilt-slips slidingly connected with the mandrel and fur-



nished on their inner faces with projections, the upper faces of which slope downward to slide upon the extension of the mandrel; and means connecting the slips with the rod.

“7. In an underreamer, the combination with a hollow mandrel, provided with a slotted extension, a spring-actuated slip-operating rod provided with a pivot-key, tilt-slips provided with key-seats adapted to be engaged by said pivot-key, said key-seats being somewhat larger than the key to allow the slips to tilt, said slips provided with inwardly-projecting shoulders, and said slotted extension provided with surfaces adapted to tilt said slips and hold the same in expanded position.

“8. In an underreamer the combination of a hollow mandrel with a hollow-slotted extension, said extension having opposite parallel bearing-faces, a slip-carrying rod in said mandrel, slips connected to said rod, said slips having projections which bear against said extension, said slips being provided with key-seats, a key carried by said rod, each end of the key lying in a key-seat of a slip, and the key-seat in each slip being somewhat larger than the key to allow the slips to partake of a tilting action.”

A hollow mandrel with inner shoulder; a downward extension with shoulder at the side of the extension; a spring on the shoulder in the hollow mandrel; a rod playing in the mandrel supported by the spring, and a key at the lower end of the rod to carry the cutters were, in such combinations, all old in the

art. The chief novel feature of the Double invention was the tilting [51] means adopted for the collapse and expansion of the cutters—in combining that means with inter-related dovetails on the cutters and ways of the body extension.

In the O'Donnell & Willard Patent (#762,435), while there may be a slight tilt of the cutters, owing to the downward and inward inclination of the interposed section of the body, and the fact that, in operation, the bottom of the machine would be full of fragments of rock and other material removed in the progress downward, as well as the interior of the bowl-shape of the lower body, the action of the cutters on the key would be *sliding*, rather than *tilting*, *rocking* or *swinging*.

In the O'Donnell & Willard patent and device the face of the interposed part of the body upon which the cutters travel has but one incline, though tending to curve. The collapse of the cutters is, therefore, gradual, while, in the patent in suit, the bearing faces upon which the cutters travel are at first parallel, until the shanks are well free from their seats, when, in operative position, the collapse is then sudden to which a tilting or swinging action on the key is necessary. The same distinction is to be found in the so-called "Jones' round-nosed" reamer.

In the O'Donnell & Willard device, while there are seats in the cutters for the insertion of the key, carried by the spring-actuated rod, the periphery of the body is unbroken. While, in the patent in suit, the pocket in the body in which the shank of the cutter becomes seated opens to the outside, permitting the



shoe of the casing to contact with the shoulder on the outside of the cutter-shank above the lower end of its head or body, and, also allows of stronger body construction.

The dovetails upon the shanks of the cutters and ways, therefore, are not found in the O'Donnell and Willard patent and device.

The so-called "Jones' round nosed" reamer was a device for which no application was ever made for patent. It never was used and was abandoned by Jones. [52]

In the Jones' round-nosed reamer, the entire movement of the cutters is directed by a dovetail structure, the ways being curved inwardly and downwardly affecting a collapse; but the method of operation is entirely different in this respect from the patent in suit. There is no spreading bearing in the Jones' round-nosed reamer to assist in the expansion and collapse of the cutters.

These differences in the mode of operation appearing in both the O'Donnell & Willard device and that of the Jones' round-nosed reamer render it unnecessary to consider further whether there should have been an interference proceeding in the Patent Office as between O'Donnell & Willard and the Double applicants; or to consider whether the Jones' round-nosed reamer preceded Double's invention and whether Double was familiar with it.

In the Swan reamer (#683,352) there are inter-related dovetail ways upon the body of the reamer and inter-related dovetails upon the cutter, which dovetails and ways, likewise, appear in the patent



in suit. But the action of the cutters in the Swan device are entirely of a sliding character. There is no swing or rock, either upon the key or the shoulders or exterior angles in the lower end of the body as in the patent in suit.

In the North patent (674,793) the action of the cutters is entirely a rocking action upon the key and upon each other. There is no interposed portion of the body and the only portion of the cutters sliding is in their upper extreme contact with the inside of the bowl formation in the bottom of the reamer body.

The Brown reamer (#687,296) is, doubtless, the closest in essential principle of anything in the prior art to the patent in suit, for the cutter is adapted to both slide upon an interposed portion of the body, provided with parallel bearing faces for that purpose, and, as the cutters slide down upon this face, they collapse inwardly over the lower end of the extension, which they are enabled to do directly because of the fact that the cutters, on [53] their inside faces, are provided with a recess for the accommodation of the enlarged lower end of the body, and they are further so enabled to collapse because they hang free upon a spring actuated device in the interior of the reamer. But they are suspended—not by means of a key-seat in a recess in the shank of a cutter larger than the key, as in the patent in suit, but the upper end of the cutter-shank is formed into an inner shoulder hooked over an exterior shoulder upon a spring actuated box open at the lower end, allowing it to travel downward with the cutters, over an interposed portion of the body. The effect of this differ-

ence will be considered later in connection with the rejection of applicant's claim first presented in the Patent Office.

Defendant also avers that a certain Canadian underreamer anticipated the patent in suit. If this Canadian underreamer was patented, the evidence does not disclose that fact. An oil well supply catalogue of 1900 was introduced in evidence, containing a cut of the Canadian underreamer, but such a catalogue is not a sufficient publication to establish anticipation.

30 Cyc., 837, 3-B.

There is also some evidence of use in the California fields of this underreamer; but, without undertaking to determine the extent of this use, an inspection of the Canadian underreamer shows that its cutters slide upon the interposed body of the reamer and are, to a certain extent, allowed to collapse because of inwardly projected shoulders; yet the cutters are not equipped with shanks carrying dovetails; nor the body with pockets to seat such shanks, but the cutters rest upon, and slide entirely without the body and are not suspended from a spring actuated rod in the upper portion of the cutter body, but are locked together and hung on the top of a bolt actuated by a spring in the lower portion of the reamer body, and, as in the Brown device, this spring-actuated bolt, while it carries the cutters as it travels upward, does not, necessarily, do so as it retires downward. [54]

These differences in operation are sufficient to avoid anticipation.

None of the underreamers of the prior art com-



bine cutters tilting over the lower end of the reamer body with shanks having dovetails so inter-related with dovetail ways, upon the body of the reamer as to afford inner, outer and lateral bearings when in reaming position.

Claims numbered 1, 2 and 3, as originally proposed, were rejected by the Commissioner of Patents upon reference to the Swan patent and were only allowed upon their amendment and that of the specifications, the effect of the amendment being to make plain the tilting action of the cutters, or slips, in addition to the inter-related dovetails and dovetail ways thereof upon the cutter shanks and body extension, which latter were found in the Swan device. The effect of the amendment is made plain by an amendment required and made to the specifications and upon which the claims were allowed. This amendment is as follows:

“The sockets or key-seats 16 are somewhat larger than the key 17 to permit the slips 15 to partake of a tilting action, the key 17 thus forming a portion, on the rod 11, on which the tilt slips or bits 15 are loosely swung or pivoted, adapting their lower ends to tilt or swing in toward the center of the stock or mandrel portion to pass through the well-casing or to tilt away from the center to assume the proper position for reaming. The tilt-slips are provided with shoulders 18 adapted to slide upon a spreading portion provided in connection with the mandrel-body.”

Claim 7—originally numbered 8—in the applica-



tion was rejected by the Commissioner of Patents upon reference to the Brown patent. The claim as then presented read:

“In an underreamer the combination of a hollow mandrel, a slip-carrying rod in said mandrel, slips connected to said rod, and means for tilting said slips.”

As allowed, it reads:

“In an underreamer, the combination with a hollow mandrel, provided with a slotted extension, a spring-actuated slip operating rod provided with a pivot key, tilt slips provided with key-seats adapted to be engaged by said pivot key, said key-seats being somewhat larger than the key to allow the slips to tilt, said slips provided with inwardly projecting shoulders, and said slotted extension provided with surfaces adapted to tilt said slips and hold the same in expanded position.” [55]

Defendant insists that, by the limitation voluntarily so placed in the claim, infringement is avoided and that the language of the broad claim, as it originally stood, “and means for tilting said slips” is necessary to cover defendant’s device, and, with that language out of the patent, there is no infringement.

In the Brown patent, upon which the claim was first rejected, the means for holding the cutters in expanded position, over which they were allowed to collapse, appear the equivalents of the Double invention; but the means by which the cutters were carried on the rod were essentially different.

It is necessary that they be so freely suspended

on this rod as to permit them to tilt forward and back; over and upon the lower end of the extension. In the Brown device, this was accomplished by an inwardly projecting shoulder upon the upper extremity of the cutter, fitted or hanging upon a shelf or shoulder extending from the spring-actuated box into the cavity provided for the accommodation of the cutter shank.

In the Double device, the key carried by the rod loosely fits in the hole in the upper part of the inner face of the cutter shank. In operation, as the rod carries the cutters up into the reaming position, the cutters will travel together, for the rod, with the aid of the key inserted in each shank, would control each cutter. But as the box upon which the cutters hang in the Brown device travel downward, the cutters do not, necessarily, travel with it, save by their own weight. The expansion on the end of the rod would keep them from falling out, but it would not bring them down with it, together.

The foot of the casing, which forces the cutters down in collapsed position, might become jammed out of shape, so as not to be uniform on both sides, or rocks or other substances might get between the foot of the casing and the outer shoulder of the cutter, resulting in one cutter being carried down ahead of the other, if anything interfered with the descent of such other. [56]

This shows such a difference in the method of operation as to prevent anticipation of the Double invention by the Brown. It is, therefore, obvious that, as Brown invented one "means" and Double



another "for tilting the slips," the Commissioner of Patents rightfully rejected Double's broad claim to all means "for tilting the slips," which would have included the means invented by Brown.

The remaining question: Whether the means adopted by Wilson of collapsing, expanding and holding the cutters in reaming position are equivalents, substantially the same as those of Double, must be resolved in the affirmative.

As already pointed out, the chief novelty and utility of the Double invention over the prior art was the combination of the inter-related dovetails on the cutter-shank and ways therefor on the body of the extension, with the means by which the tilting action of the cutters over the lower end of the body was accomplished.

It is insisted by the defendant that the complainant is not entitled to protection of this combination under the claims of the patent; that, while claims 1 and 2 cover the dovetail arrangement, and claims 6, 7 and 8 cover the means securing the tilting action, there is no claim covering both.

If defendant's assumption were conceded, as long as the lesser combinations were covered by valid claims, no good reason appears—it being found that the entire combination is an invention of decided merit—for allowing only a narrow range of equivalents, although this course might be justified if each of the claims was considered entirely independently of everything else than the prior art.

Defendant's contention in this particular is based on a false premise. Claim 1 covers both the dovetail



ways on the body, co-acting with dovetails on the slips or cutters, and means for the expansion and collapse of the cutters over the lower end of the extension. The following language of the claim covers the latter feature: [57]

“said slips being furnished with inward projections to slide upon the downward extension of the mandrel to spread apart the cutting edges of the slips when the slips are drawn up.”

It is obvious that, if the cutters spread when drawn up, they would collapse on being drawn down. That this claim not only covers the dovetail slips and ways, but such expansion and collapse of the cutters and the means for its accomplishment is further shown by the paragraph of the amended specifications above quoted, upon which amendment the Commissioner of Patents allowed claims 1, 2 and 3.

As to claims 1 and 2, it is insisted by the defendant that its forked, or pronged formation of the lower extension, rather than the hollow slotted formation of the closed bottom of the patent in suit, and the omission of the opposite parallel bearing faces on such extension so differentiates the Wilson reamer as to essentially change the mode of operation.

The feature of “opposite parallel bearing faces” is only included in claims 1 and 2 and does not appear in claim 3. The opposite bearing faces 9 upon the prongs in the Wilson device are the equivalent of the opposite parallel bearing faces in claims 1 and 2 of the patent in suit. It is true that the former are not exactly parallel, but they are approximately so

and could be made so without affecting, materially, the function discharged by them.

In the patent in suit, the opposite parallel bearing faces extend upward the entire length of the extension to the shoulder that forms the upthrust bearing for the cutters, except as cut to afford a slot for the playing up and down of the key carrying the cutter, thus they form an inner bearing and guide for the upper end of the cutter as it travels up and down.

In the Wilson, these opposite bearing faces are not carried the entire length of the extension. This omission helps [58] to form the pronged formation which enables Wilson to give the end of the rod inserted between the upper cutter shanks a heavier construction, taking on itself the duty before, in part, performed by the upper portion of the opposite parallel faces in the patent in suit. In view of the state of the art, and particularly of the Brown patent and device, I find this would be the substitution of a well known mechanical equivalent. Therefore, no avoidance of infringement. The effect of this changed formation, from the hollow slotted extension to the pronged formation, is rather to permit of additional features and the accomplishment of further action.

The change permits the cutter shank to collapse between the prongs, which permits of more stock in the cutter shank, eliminating the notch on the inside, which is a feature of the Double cutter, above the inwardly projecting shoulder, which notch in the Double cutter is necessary to allow of the collapse of the cutter over the lower end of the extension, the



web of which is unbroken. There is testimony to the effect that this notch constitutes a weakness in the Double cutter.

This provision for the collapse of the cutter between the prongs is the chief additional function accomplished by the pronged formation, although it also permits of the assembling of the reamer from the bottom, instead of the top, and has an advantage in permitting the re-machining of the lower end of the body of the reamer. But these latter features do not affect, directly, the operation of the machine when in use. These differences may constitute improvements, warranting the issuance of patent; but substantially the same dovetails on the cutters and ways therefor, and like means for tilting the cutters remain as in the patent in suit. The principle of action—the mode of operation, is not substantially changed and infringement is not avoided by the improvements.

*Stebler v. Riverside Heights Orange* [59]

*Growers Ass'n.*, 205 Fed. 735;

*Lourie Imple. Co. v. Lenhart*, 130 Fed. 122;

*Norton v. Jensen*, 49 Fed. 859.

Claim 6 reads:

“In an underreamer, a mandrel furnished with a hollow slotted extension, the lower end of which slopes upward at the edges; tilt-slips slidingly connected with the mandrel and furnished on their inner faces with projections, the upper faces of which slope downward to slide upon the extension of the mandrel; and means connecting the slips with the rod.”



It is insisted by the defendant that further substantially different means are employed in its device from the foregoing. In the foregoing claim the lower end of the hollow slotted extension, it is said, "slopes upward at the edges." This feature is one of the means in accomplishing the tilting or collapsing and expanding of the cutters.

In the Wilson reamer, the slopes are at the lower end of each prong, described in Wilson's specifications as "the beveled end faces 17 of the downwardly-projecting lugs 2' " If the prongs were joined by a web, the formation would, instead of pronged, become hollow and slotted, and the slopes of the prongs would be "at the edges" of their upward slope.

It is clear that the means and manner of discharging this function are substantially the same in each. Claim six further provides that the tilting slips shall be "furnished on their inner faces with projections, the upper faces of which slope downward to slide upon the extension of the mandrel." The projections and sloping face are numbered 18 and 26 in figures 9 and 11 of the Double drawing.

Defendant contends that, of the parts in question, the Wilson device has no clear mechanical equivalent for this downward sloping face upon an inward projection. The corresponding part in the Wilson cutter is described in the specifications, and referred to in the drawings as follows:

"The expansion bearing-faces 4<sup>3</sup> terminate at their [60] upper ends in rounded corners or bearings 16 to ride more readily over the beveled end faces 17 of the downwardly-pro-

jecting lugs 2' to engage said bearings for expanding the cutters.

The object sought in both formations was to have the cutter slide freely in collapse and expansion up and down over the upwardly and outwardly sloping portion of the body. Infringement could, therefore, not be avoided merely by rounding the shoulders or corners in place of a straight slope—as merely to affect this purpose the rounded shoulders could not, inaptly, be described as “rounded slopes.”

It is further contended that the portion of the face of the cutters which corresponds and slides upon the lower part of the prongs is not upon a “projection.” Change in form alone, unless it substantially changes the method of operation, is not sufficient to avoid infringement. No citation of authority is necessary in support of this proposition, though there may be an exception, but the exception is not of importance in the present instance.

In one view, the rounded corners are upon the upper face of the projection for they are on a projection of the body of the cutter, as distinguished from the shank. By the pronged formation, the cutter shank could be made heavier in the Wilson than the Double and the shank projects still further inward than the projection on the body of the cutter, which carries the rounded shoulder. By cutting away the heavier portion of the cutter shank, permitted by the pronged formation—which elimination would in no way prevent the discharge of the function in question—it becomes clear that



the means and function of the parts in question are the same in both devices, although the improvement by the Wilson arrangement may justify a patent to protect the variation.

Claim 7 reads:

“In an underreamer, the combination with a hollow [61] mandrel, provided with a slotted extension, a spring-actuated slip-operating rod provided with a pivot-key, tilt-slips provided with key-seats adapted to be engaged by said pivot-key, said key-seats being somewhat larger than the key to allow the slips to tilt, said slips provided with inwardly-projecting shoulders, and said slotted extension provided with surfaces adapted to tilt said slips and hold the same in expanded position.”

Aside from what has already been considered, the only element covered in this claim to be compared with Wilson's device is the “pivot-key” with which the “spring actuated slip rod” was provided, “the key-seats” (on the tilt slips) “being somewhat larger than the key to allow the key to tilt.”

The enlarged key-seat in the Wilson is identical with that of the patent in suit. Its function is identical. While the words “pivot-key” do not disclose that the key and the rod are separate elements, yet that such was designed by Double is shown by the drawings and specifications. In the Wilson the rod and key are integral.

While this and the pronged formation of the body extension permit of a heavier and stronger key and cross-head in the Wilson device than the Double,



it does not in any way essentially affect the mode of operation by which its function is discharged, in carrying the cutters up and down and in permitting their tilting.

The elements described in claim 8 have been considered in connection with the other claims and are found to be identical, or the equivalents of like elements in the defendant's structure.

Many lesser matters have been discussed and elaborated upon by counsel, but enough has been said. I deem the lengthening of this opinion further, unwarranted.

Infringement of claims 1, 2, 6, 7 and 8 is clear. The injunctive relief prayed will be granted.

[Endorsed]: No. 1540—In Equity. In the District Court of the United States, for the Southern District of California, Southern Division. Union Tool Company, Complainant, vs. Wilson & Willard Manufacturing Company, Defendant. Memorandum Decision on the Merits. Filed Jun. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [62]

*United States District Court, Southern District of  
California, Southern Division.*

IN EQUITY— CIR. CT. No. 1540.

UNION TOOL COMPANY, EDWARD DOUBLE,  
ROSA EICHENHOFER, as Administratrix  
of the Estate of FRIEDRICK EICHEN-  
HOFER, Deceased and GEORGE L. CHAD-  
DERDON,

Complainants,

vs.

WILSON & WILLARD MANUFACTURING  
COMPANY,

Defendant.

**Interlocutory Decree.**

The above-entitled suit having come on regularly for final hearing before the Court upon the proofs taken on behalf of the respective parties, and the Court having heard the argument of Frederick S. Lyon, on behalf of complainants and Raymond Ives Blakeslee on behalf of defendant, and upon due consideration thereof:

IT IS ORDERED, ADJUDGED AND DECREED,

1. That complainant Edward Double was the original, first and sole inventor of the underreamer set forth, described and claimed in letters patent of the United States No. 734,833 granted July 28, 1903; that said letters patent are good and valid in law, particularly as to claims 1, 2, 6, 7 and 8 thereof;

that the said invention was not known or used by others before the said Edward Double's invention or discovery thereof, or patented or described in any printed publication in the United States of America or any foreign country before the said Edward Double's invention or discovery thereof, or more than two years [63] prior to the application of said Edward Double for said letters patent, or in public use or on sale in the United States of America for more than two years prior to such application for said letters patent therefor, and not abandoned; that said letters patent were issued in due form of law and after due examination made by the Commissioner of Patents as to the novelty and patentability of said invention; that by the said letters patent there was secured to the said Edward Double, his heirs, legal representatives and assigns, for the term of seventeen years from and after the 28th day of July, 1903, the exclusive right and liberty of making, using and vending to others to be used, underreamers embodying the said invention in and throughout the United States of America and the territories thereof; that the title to said letters patent is in the complainants, as alleged in the bill of complaint.

2. That immediately after the production of said invention by said Edward Double underreamers embodying the said invention went into extended general use and substantially displaced all other underreamers or tools for such use and became the underreamer in general use in California in underreaming wells; that the exclusive rights of complainants in



and under said letters patent have been generally respected and acknowledged by the trade and by users of such tools, and the validity of the said letters patent and the title of complainants thereto have been generally acknowledged and acquiesced in by all manufacturers, except the defendant herein, the trade and users of such tools, and but for the wrongful and unlawful acts of the defendant in infringement of said letters patent complainants would have been in the continued enjoyment and possession of said exclusive rights, that upon all underreamers manufactured or sold or used by complainants [64] either or any of their predecessors in interest since the day of the grant, issuance and delivery of said letters patent, there has been plainly marked thereon the word "Patented" together with the day and date of the grant and issuance of said letters patent, to wit,—July 28th, 1903; that defendant prior to the filing of the bill of complaint herein had full, complete and personal knowledge of, and had been notified in writing of, complainants' rights under said letters patent and of the grant, issuance and delivery thereof, and prior to the commencement of the wrongful and infringing acts had full knowledge and notice of the grant, issuance and delivery of said letters patent to complainants, and of complainants' rights thereunder.

3. That defendant has infringed upon said letters patent, and particularly upon claims 1, 2, 6, 7 and 8 thereof, which are as follows:

1. An underreamer comprising a hollow mandrel furnished with an internal shoulder, a

downward extension having opposite parallel bearing-faces having a keyway therein, shoulders at the sides of such extension, and upwardly and inwardly sloping dovetail slipways beneath said shoulders; a spring on the shoulder in the hollow mandrel; a rod playing in the mandrel furnished with a key-seat and supported by the spring; dovetail tilt-slips playing in the slipways and furnished with key-seats respectively; a key in the key-seats of the slips and rod and playing in the keyway of said extension to hold the slips against the shoulders; said slips being furnished with inward projections to slide upon the downward extension of the mandrel to spread apart the cutting edges of the slips when the slips are drawn up.

2. An underreamer furnished with a mandrel having a downward extension provided with opposite parallel bearing-faces and a keyway in the extension; a spring supported rod furnished with a key-seat and playing up and down in the mandrel; tilt-slips slidably connected with the mandrel and furnished with inward projections to slide upon the opposite bearing-faces of the downward extension to spread the slips apart at the lower ends when the slips are drawn up; and a key carried by the rod and carrying the slips. [65]

6. In an underreamer, a mandrel furnished with a hollow slotted extension, the lower end of which slopes upward at the edges; tilt-slips slidably connected with the mandrel and fur-



nished on their inner faces with projections, the upper faces of which slope downward to slide upon the extension of the mandrel; and means connecting the slips with the rod.

7. In an underreamer, the combination with a hollow mandrel, provided with a slotted extension, a spring-actuated slip-operating rod provided with a pivot-key, tilt-slips provided with key-seats adapted to be engaged by said pivot-key, said key-seats being somewhat larger than the key to allow the slips to tilt, said slips provided with inwardly-projecting shoulders, and said slotted extension provided with surfaces adapted to tilt said slips and hold the same in expanded position.

8. In an underreamer the combination of a hollow mandrel with a hollow slotted extension, said extension having opposite parallel bearing-faces, a slip-carrying rod in said mandrel, slips connected to said rod, said slips having projections which bear against said extension, said slips being provided with key-seats, a key carried by said rod, each of the key lying in a key-seat of a slip, and the key-seat in each slip being somewhat larger than the key to allow the slips to partake of a tilting action.

by the manufacture and sale of the so-called "Wilson" and "Wilson Improved" underreamers like complainants' exhibit, "Wilson Reamer" and "complainants' exhibit, Wilson Reamer No. 2" and the Wilson reamer with the two-piece key-construction; and that each of the said Wilson reamers



embodies and contains the invention patented in and by said letters patent and particularly embraced within each of said claims 1, 2, 6, 7 and 8 thereof; that each of the said Wilson reamers is an infringement upon each of said claims 1, 2, 6, 7 and 8 of said letters patent; that each and all of said Wilson reamers were manufactured and sold by defendant without the license or consent and against the will of complainants, or any of them, or any of their predecessors in interest, and in infringement and violation of said letters patent and of the exclusive rights thereby granted and secured to complainants.

[66]

4. That defendant, its officers, attorneys, directors, agents, servants, workmen and associates, and each and every of them be perpetually enjoined from manufacturing or causing to be manufactured, using or causing to be used, selling or causing to be sold, either directly or indirectly, any underreamer or underreamers like or embodying the construction or interrelation of parts of either "Complainants' Exhibit Wilson Reamer," "Complainants' Exhibit Wilson Reamer No. 2," or the Wilson underreamer with the two-piece key device, or the underreamer set forth or described in letters patent No. 827,595, dated July 31, 1906 to Elihu C. Wilson, and from manufacturing or causing to be manufactured, selling or causing to be sold, using or causing to be used, either directly or indirectly, any part or parts thereof capable of being combined or used as a part of any underreamer or device in infringement of said letters patent, that is of claims 1, 2, 6, 7 and 8 thereof

in any manner whatsoever, or from manufacturing or causing to be manufactured, using or causing to be used, selling or causing to be sold, either directly or indirectly, any combination of parts capable of being assembled together or used in infringement of said letters patent that is of claims 1, 2, 6, 7 and 8 thereof.

5. That complainants recover of the defendant the profits, gains and advantages which said defendant has derived, received or made by reason of said infringement; and that complainants recover of the said defendant any and all damages which complainants or either of them have sustained or shall sustain by reason of said infringement of defendant.

[67]

6. And it is hereby referred to Lynn Helm, Esq., as Special Master of this Court, who is appointed, *pro hac vice*, to take and state the account of said gains, profits and advantages, and to assess such damages, and to report thereon with all convenient speed, and the said Wilson & Willard Manufacturing Company, defendant, its officers, directors, attorneys, agents, servants, employees, workmen and associates, and each of them, are hereby directed and required to attend before said Special Master from time to time as he may require, and to produce before him such books, papers, vouchers, documents, records or other things, and to submit to such oral examination as to Special Master may require.

7. That complainants do have and recover judgment against defendant Wilson & Willard Manufacturing Company for the sum of \$2,587.49, com-

plainants' cost and disbursements herein, and that the further questions of increase of damages be reserved until the coming in of the Master's report.

Dated June 27th, 1916.

EDWARD E. CUSHMAN,

District Judge.

Decree entered and recorded July 1, 1916.

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk.

[Endorsed]: Cir. Ct. No. 1540. United States District Court, Southern District of California, Southern Division. Union Tool Co. et al., Complainants, vs. Wilson & Willard Manufacturing Company, Defendant. In Equity. Interlocutory Decree. Filed Jul. 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainants. 3 Eq. Jl. 390. [68]



*In the United States Circuit Court, in and for the  
Ninth Circuit, Southern District of California,  
Southern Division.*

IN EQUITY—No. 1540.

UNION TOOL COMPANY, ROSA EICHEN-  
HOFER, as Administratrix of the Estate of  
FRIEDRICH EICHENHOFER, Deceased,  
GEORGE L. CHADDERDON, and ED-  
WARD DOUBLE,

Complainants,

vs.

WILSON & WILLARD MANUFACTURING  
COMPANY,

Defendant.

**Notice as to Taking Testimony.**

To Wilson & Willard Manufacturing Company, De-  
fendant, and Hunsaker & Britt, and F. A. Ste-  
phenson, its Solicitors.

Please take notice that complainants in the above-  
entitled suit desire all of the evidence to be educed  
in the above-entitled cause to be taken orally.

Respectfully,

FREDERICK S. LYON,

Solicitor for Complainant.

Received a copy of the foregoing notice this 22d  
day of September, 1910.

F. A. STEPHENSON and  
HUNSAKER & BRITT,  
Solicitors for Defendant. [69]

[Endorsed]: No. 1540. U. S. Circuit Court, Southern District of California, Southern Division. Union Tool Co. et al. vs. Wilson & Willard Mfg. Co. Notice That Complainants Desire Testimony to be Taken Orally. Filed Sep. 26, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [70]

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*In the United States District Court, Southern District of California, Southern Division.*

IN EQUITY—CIRCUIT COURT No. 1540.

UNION TOOL COMPANY et al.,

Complainants,

vs.

WILSON & WILLARD MANUFACTURING  
COMPANY,

Defendant.

**Testimony.**

Proofs for final hearing, taken pursuant to the sixty-seventh equity rule, before Leo Longley, Special Examiner, by stipulation, commencing at 3 o'clock P. M., Friday, November 1st, 1912, at 504 Merchants Trust Company Building, Los Angeles, California.

Present: Frederick S. Lyon, on behalf of complainants; F. A. Stephenson and T. W. Waldon and Raymond I. Blakeslee, on behalf of defendant.

Whereupon the following proceedings were had:

It is stipulated and agreed that uncertified printed copies of United States letters patent furnished by the United States Patent Office may be offered in evidence with the same force and effect as originals

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or duly certified copies, subject to such objections as to competency under the pleadings, relevancy and materiality as shall be offered and subject to the right to either party to offer certified copies thereof in case any error be found in any printed copy offered.

It is further stipulated and agreed that the depositions of the witnesses be taken stenographically, either by the Special Examiner or other competent stenographer appointed by him, and that a copy of the depositions of all witnesses on [71] behalf of both parties be furnished each side, and that the cost of such copy for each side shall be taxable as cost to the prevailing party.

It is further stipulated and agreed that the reading over and signing of the depositions of the witnesses be, and the same are, hereby waived, and that the Special Examiner shall certify the same to the Court, with the same force and effect as though duly read over and signed by the witnesses; subject, however, to the right to either party to demand the reading over by any given witness of his deposition and the signing thereof, such demand to be made not later than the time of excusing such witness from the stand.

It is further stipulated and agreed that for the purposes of this suit the complainants are the owners of the full and exclusive right, title and interest in and to the Double patent referred to in the bill of complaint and no question as to title is in issue in this suit.

It is further stipulated and agreed that the de-



fendant received from the complainants, on about the date of such instrument, a notice in words and figures as follows: [72]

It is further stipulated and agreed that the Union Tool Company and the Wilson & Willard Manufacturing Company are corporations as alleged in the bill of complaint.

It is further stipulated and agreed that all exhibits offered in evidence during the taking of proofs in this case may be retained in the custody of counsel offering the same, to be filed with the clerk of this court when the case is called for final hearing, and to be produced at the subsequent taking of testimony or depositions on behalf of either party, upon notice, and each party shall have access to all such exhibits during business hours.

Mr. LYON.—The complaint offers in evidence copy of letters patent No. 734,833, dated July 28, 1903, to Edward Double, for underreamer, and the same is marked “Complainant’s Exhibit Double Patent.”

Whereupon the further taking of testimony herein was adjourned until Saturday, November 2, 1912, at 10 o’clock A. M., at the same place.

On Saturday, November 2, 1912, at 10 o’clock A. M., the further taking of testimony herein was resumed, pursuant to the adjournment. Present: Frederick S. Lyon, on behalf of the complainants; F. A. Stephenson and T. W. Waldon and Raymond I. Blakeslee, on behalf of the defendant.

Whereupon the following proceedings were had:

It is further stipulated and agreed that in case the

counsel called upon to cross-examine any witness for either party desires a transcript of the testimony in direct examination of the witness before cross-examining him, the witness be excused from the stand until such transcript be furnished, and that any delay thereby occasioned shall entitle the party to a reasonable extension of time for completing proofs. [73]

It is stipulated that no question as to title is in issue in this suit, and that defendant prior to the commencement of this suit received notice from complainants of the grant of the Double patent in suit and of the charge that defendant was infringing by the manufacture of the Wilson underreamer.

**Testimony of William E. Youle, for Complainants.**

WILLIAM E. YOULE, called as a witness on behalf of complainants, testifies:

My name is William E. Youle; age 65; occupation, drilling oil wells; residence, Los Angeles since 1877. Prior to 1877 I resided in the Pennsylvania oil fields, was engaged in drilling oil wells there from 1863 to 1876; I have continued connected with drilling oil wells in California for about thirty-two years. The first California oil field I drilled in was Newhall. The next was Moody Gulch, Santa Clara County. Next, back to Newhall. Next, to Puente—opened up the Puente. Eleven years in the Kern County fields—opened up the first wells there. Then drilled north in Colusa County—two or three years there wild-cattling deep wells. Back to San [74] Luis Obispo County—deep wells there. Three years ago



(Testimony of William E. Youle.)

I graduated, after thirty-five or thirty-six years in the business.

By "wild-catting" I mean looking out territory first, with a view of ascertaining the probabilities, the ear-marks that you could see, and making up your mind whether you would be justified in trying for oil. Subsequently, after more investigation, you make up your mind to drill a well. In fact, the Newhall field, the Puente field and the Kern River field were all due to my first efforts.

I have had a whole lot of experience with underreamers. My first experience with underreamers—I have tried a good many—were not successful. The first tool that I ever saw and used was an underreamer with a cutter on one side with a spring attached to it to throw it up under the pipe. That was in about 1882. The next thing I saw was a bit, split in the middle, with a tapering wedge, that when it hit the bottom it would expand the bit the full size of the hole. It looked all right. The trouble we had with that was the stem that threw the wedge open, when it hit the bottom, would break the tool off and we could not get the tool out. The trouble with the one-sided arrangement was it would come down the wall here and strike a hard streak and it wouldn't hardly touch it but would glance back, and then come to a soft streak and it would cut a great hole in the side of it; and that would make a straight hole crooked—that is, the reamed part of it would be crooked, due to the fact that the one-sided arrangement would not cut out where you wanted. That



(Testimony of William E. Youle.)

was a failure. The bit was a failure in consequence of the liability of the stem that was to shove the wedge down after it came to the bottom—the stem would hit the shoe and push the wedge down, and break, and we could not get the tool out. And sometimes that would get balled up with mud. All drillers know what that means. It gets so you can hardly cut it off with a chisel. It would hold the stem [75] rigid and in trying to get it through you would break it off, maybe. We had that trouble. Well, that didn't work, and the one sided reamer didn't work. Now, I think, the next one, I got a Leidecker in West Virginia. There was one of those shipped out here—I think I used the first one—by McFee, the McFee Supply Company, and he wanted me to use it or try it. Well, it seemed to start off pretty well; but we got into hard rock and we could not get the pipe to follow. The trouble with that reamer was the clearance was too large, and it had the same proposition of a wave in reaming that the others had. Well, I got pretty near disgusted with underreamers. But I bought another one. A man by the name of Mentry invented one. It had two legs, with a knuckle at the bottom, and spring attached to the knuckle so as to throw it up until it reached under the pipe and then the spring released it and expanded it. And I bought that just complimentary to Mr. Mentry. I didn't use it; but I loaned it to a fellow at \$5.00 a day, and he fished for it for three months and he never got it out of that hole. That was a reamer that I never used.

(Testimony of William E. Youle.)

By "fishing" I mean: He put it down without a heavy sinker run it light—and it was like a hollow-reamer. It was the worst thing that was ever put in a hole. And he got down into that hole with it unexpanded, into a place that caved out big enough for the reamer to expand, and I am a son of a gun if you could get it back, because it would not hit the pipe, you know. It went down unexpanded too low; got into a place that it shelved off, and big enough to expand, and dammed if he could it out. He could not ream out above it, and there he was. He finally jarred off the neck of it and left it in the hole, and he fished for it about three months. When I say "fished" I refer to a tool being lost in a hole. The reason I forgot to state about that one, I never used that. But that was a reamer that I did have. Well, then I think the next one that I used—I didn't [76] use that myself, but I had a crew use it for a little while. This reamer was an Austrian under-reamer. Well, the boys used that, but we could not get the pipe to follow it. Now, you see in that Sunset field it was alternate in the change to hard shelves down the hole; and the Puente field the same way; and the way we got down as deep as we did was by being very careful, first, not to pour any water in the hole to soften it, and second, by having everything ready so that there was no delay to allow the rock to rot and cave in, and chase that hole down as fast as we could and put in a string of pipe to protect it—though maybe if we were lucky we might get a hole 1500 feet in that kind of formation, but we



(Testimony of William E. Youle.)

would have to be lucky to do it, because we didn't underream and couldn't underream with anything we had had up to that time, up to the time I speak of the Sunset and Puente field. Later, about 1902, maybe, or 1901—I forget the date—I got a letter from Mr. Double regarding an underreamer, and I had heard of it before through Mr. Kellerman. I was ready to try anything that would get a hole down, and I tried it, and used the underreamer myself. In one instance we had 400 feet of very hard rock, and we were drilling an experimental well. Below that 400 feet of hard rock we struck a very bad soft, cavy formation that we could not drill any more in that hole without pipe. That was the first hole that I used the Double underreamer in, and I used it myself. I had men there sharpening the cutters and pretty near kept them busy. It was very hard and you could not get more than half a screw at most. That would be approximately two feet and a half, without sharpening the bits. Now, we put a stem right on top of that underreamer and went through it just the same as drilling. But I kind of led up to that; I didn't do it at once. But I saw it was doing the work and I knew if I could hit it hard enough I could ream it. I never lost a cutter, I never had an accident, while reaming that 400 feet. Subsequently [77] I got the pipe in below that 400 feet down into this soft streak successfully; got down into a bad place in the bottom, and in drawing the pipe left a joint in there. We could not get at the pipe after pulling the other pipe, because it caved



(Testimony of William E. Youle.)

on top of it. We put on a new shoe and went down to the cave of this pipe, and the bit would not hit it; it was just one side. I says to the boys, "Put that underreamer on with three jars and crack it to it," and dammed if we didn't cut through that pipe in there and drill it up with that underreamer. I finished this particular well to 3,000 feet deep, was using eight-inch casing when I started the use of this Double underreamer, and carried the eight-inch casing 2,400 feet down.

As a matter of fact, if we didn't have an underreamer we could not have done the work. I had never seen any before. We would have had to stop the eight-inch at the depth of this hard streak and put in six-inch. Then the six-inch inside of the eight-inch would make a difference of two inches and the difference of one string of pipe. It would have been disadvantageous to have thus decreased the size of the casing because of the fact that in our past experience when we did that we were making the hole smaller and reducing the liability of getting it deep enough. Well, there was a good deal of territory condemned here because of the fact that they had gone to the end of their string, as they called it. 1200 feet was very deep before the underreamer, and they condemned territory with millions of dollars in it because they could not go down.

The use of a successful underreamer simply made California worth millions of dollars, for the reason that all deep territory is the prolific territory. It enables you to reach the deep territory.

(Testimony of William E. Youle.)

After my experience with this well I subsequently used other Double reamers to the entire extent of underreaming whenever [78] necessary.

The Mr. Double that I have referred to is Edward Double, the President of the Union Tool Company of Los Angeles.

Since 1902 I have been about the fields of California all the time up to three years ago, and since three years ago have made long trips into the fields; made trips east into the fields. I have always done that. I never go east without going into the oil fields.

The first time I saw the Wilson Reamer I thought it was a Double reamer. I did not take it apart or anything. I had not heard of a Wilson reamer at that time. I thought it was a Double reamer because the cutters resemble the Double, the body of the reamer and the cutters. Prior to the Wilson reamer there was nothing really in use by practical men except the Double. Mr. Edward North, of Los Angeles, made a kind of a reamer, a kind of a hay press I called it. It really could not do the work you know. I tried it; did not have any success with it at all. And the way that happened, I bought an outfit—engine, boiler, rig, tools and all—and the North reamer was with them. And we had a little shell under the pipe up in Ventura, and I said, “Boys, that may scrape that off”; and we could not do it, we had to get another reamer. The thing would not latch; it came out through on top when the jaw is spread out and we could not make it work.



(Testimony of William E. Youle.)

The North reamer I speak of is that shown in patent No. 674,793, to Edward North.

My son tells me they are using Double reamers in India. I don't know anything about how many they have got there, or anything about it.

Q. 48. I will ask you to compare, as to the mode of operation and the inter-relation of the parts, the Double underreamer, to which you have referred, with the Wilson underreamer. [79]

A. Well, I don't see much difference except the incline that it slides on. The effect is the same. That is the Wilson, ain't it? (Witness picks up a bit of the Wilson reamer.) Well, I can't exactly diagnose now just how those are; but what I see is the slide; the incline is different on the Wilson from the other one. That is all. But it is in the same position in the end.

Q. 49. Is the mode of operation different?

A. No. It may be technically different, but to me it don't seem to me it would make any difference to plane out, that is, to slide up a plane, which way you expanded it, whether you did it on the side or in the center. Make the same motion whether it runs up the side. That is about all the difference I see.

Q. 50. You never personally used a Wilson reamer, did you?

A. No. I had a Wilson reamer over there at Sunset—at least had knowledge of it. I was up to the Monarch Oil Company one day, and I said then—it was latched up, you know; I said, "To look at it you would think it was a Double," but I didn't take it



(Testimony of William E. Youle.)

apart and look at it, nor they didn't. But it would be difficult matter, to look at that, to tell exactly the difference. I would not like to go into that. I can't see any difference. That is, the working of it is similar.

Cross-examination.

(By Mr. BLAKESLEE.)

Q. 51. Where was the first underreamer that you saw in use? A. The first underreamer?

Q. 52. Yes. A. In my life?

Q. 53. Yes.

A. The first underreamer that I ever saw was one I used myself along in 1880. [80]

Q. 54. "Where" was the question?

A. It was in Santa Clara County near Parisimo.

Q. 55. What type of reamer was that?

A. The latch on the side.

Q. 56. Do you remember the name of it?

A. I don't, no. I think it was made by—I know it was—by Charlie Oester of the American Tool Works of San Francisco. Pretty good to member that, too; but I do.

Q. 57. Did it not actually underream so as to permit the lowering of the casing?

A. You mean to permit the casing to go down the hole?

Q. 58. Yes. A. Oh, no.

Q. 59. What did they use it for?

A. Why, it is like drilling a well in theory—it looked all right on paper, but it didn't work so well. You see, the bearing was all one side, throwing the

(Testimony of William E. Youle.)

back of the underreamer clear to the wall on the other side.

Q. 60. I understand your statement as to that; but did it not actually operate to underream, and was it not so used?

A. Well, the idea is this. I think you will appreciate that, too. You dig a hole that is straight. It has got to be straight to let the pipe in. You may enlarge that hole four inches and still not get your pipe further than before. Why? Because you enlarge it in a circle out here and the pipe cannot go down through.

Q. 61. Well, did they stop using it, as soon as they started, for that reason?

A. Well, I stopped it.

Q. 62. Did you know of its being used elsewhere?

A. No. I know it was tried elsewhere but they didn't use it very long. I know several that bought them. [81]

Q. 63. What I am getting at is, was it not used successfully in the respect that it permitted the casing to go down?

A. Never, to my knowledge.

Q. 64. As to the next underreamer you have testified to—where was that used?

A. Sunset, about 1892, or '3.

Q. 65. Was that used more or less extensively?

A. No.

Q. 66. Did it not actually underream?

A. No; not actually.

Q. 67. And what was the name of that?

(Testimony of William E. Youle.)

A. The casing would not follow.

Q. 68. No; the name of that underreamer.

A. The Swan, made by Leidecker.

Q. 69. You have encountered that Swan underreamer in other fields in California?

A. Oh, I have seen them laying around. Not very many. I think I have seen—I don't remember of ever seeing more than two I used to buy second-hand rigs, and in doing that, you know, taking an inventory of the material, I would run across different kinds of tools that had been used, or tried and thrown away.

Q. 70. There is a Swan underreamer in use at the present time, is there not, and also a Leidecker?

A. No; I don't know that there is. I don't know of any first-class driller or contractor that is not using the Double underreamer. I don't know of any—or the Double principle. Now, if I saw that reamer hung on a stem swinging over the hole, I would be inclined to think they were using the Double. (The witness points to the Wilson reamer in front of him.)

I don't know of any first-class driller or contractor that is not using the Double underreamer. I don't know of any—or the [82] Double principle. Now, if I saw that reamer hung on a stem swing over the hole, I would be inclined to think they were using the Double. (The witness points to the Wilson reamer in front of him.)

Q. 71. Then am I to understand that you have never particularly studied the differences between



(Testimony of William E. Youle.)

the Wilson and the Double and between the Double and other underreamers, as to their specific construction?

A. Yes, I have. That is, the difference is this, that [83] it is so near the same that I could not tell the difference. The way it appeared to me, the way of working, and the cutters, and all, seemed to be on the same principle. I thought I saw a little difference the way it slid up an incline on the side. (The witness refers in his last answer to the Wilson underreamer in front of him.)

Used to drill wells at a flat price and naturally had to investigate the tools used very carefully. Very little change in Double reamers. Did not find any use or need for underreamers in Ohio, Canada and Pennsylvania. Nor did they need them in Indiana. They do need them in West Virginia however. Can't tell how long I have heard of Wilson Reamer but have heard drillers say they liked them. Technically there may be some difference between the Wilson and the Double Underreamer but naturally I can't see any difference whether they expand from the side or from the middle or where. The principle is the same. It is for the mechanic to describe the difference. What difference does it make to me how a man takes me up a hill, whether it is one side of the hill or the other, as long as he gets me on top and does it automatically and does it systematically. The construction is the same all through. It is not the outside appearance. The outside appearance might be deceiv-

(Testimony of William E. Youle.)

ing. But as nearly as I can figure it out, it is the same thing. What difference does it make whether I expand that in here or out here? (The witness in the last answer points to the Wilson reamer and first points to the opening between the two side walls or ends of the lower extremity of the reamer and then to the walls themselves.) The spreading feature, in my estimation, is the same. It spreads on the uplift at the end. They latch together the same. Have been more interested in the results obtained than in the actual construction.

Q. 89. I suppose you appreciate the difference which exists between these reamers—[84]

A. Well, I would like to know myself. What difference is claimed?

Q. 90. With respect to the arrangement of the spreading feature.

A. The spreading feature, in my estimation, is the same. It spreads on the uplift at the end. They latch together the same.

Q. 91. Do you find any one part in the Wilson reamer for spreading the cutters?

A. Oh, I would have to take that reamer and hang it up. Those are things I don't care to go into.

Q. 92. It speaks for itself? A. Yes.

Q. 93. Then you have been more interested, I take it, in the work which the reamer would do than in the particular manner in which it did it or the construction whereby it did it? Is that not so?

A. I have been more interested in the results obtained by its use; yes.



(Testimony of William E. Youle.)

Q. 94. In your use of the Double reamer, have you ever had any of the cutters break?

A. Oh, yes; I have had the cutters too hard and had them shell off on the corners here. (Witness points to the bottom portion of the slip or cutter.) They would be tempered too hard and break here. (Pointing to the end of the cutter.)

Q. 95. Did you ever have any of them break above the cutting portion of the slip? A. No.

Q. 96. The Double reamer which you used had a top portion jointed to the body or mandrel, which is before us here, did it not?

A. You mean joint here?

Q. 97. Yes. [85] A. Yes.

Q. 98. In use did you ever have these joints fall or break?

A. Never. No; I never had one break.

Q. 99. Have you heard of them breaking at that point?

A. Why, I don't know. I have seen them in the shop for repairs. Here is the proposition about this: If it breaks off there—take the top of the Wilson and that would break off here. You lose the pin off and then loose the string. The same thing will occur in the Double or any other tool that you run in the hole, if they are used by men who punish them.

Q. 100. Did you ever hear of a Wilson breaking at that point?

A. Oh, no; that would not cut any figure at all with me. If there was a bad driller on, they will break.



(Testimony of William E. Youle.)

Q. 101. Did you ever hear of one?

A. I don't know as I ever did; no. My experience is they will break anything.

Redirect Examination.

Q. 112. I understand the old reamer, then, that you used, had the shoulder that you refer to now square instead of inclined.

A. I think it was square. It was so near square, anyway that it looked square. Then there was another thing I called Mr. Double's attention to and he remedied. This side here (referring to the side of the bit) was first made too small, outside, in diameter, and if the shoe got worn a little this would enter the shoe before the shoe would hit that and knock it down; the shoe would get away down here, so it was bothersome; and Mr. Double increased the size from here to here and we have never had any trouble since.

Q. 113. When was that increase made?

A. Oh, that was five or six years ago. More than that, I guess.

Q. 114. That change is simply in the size and the proportion of the slip. [86]

A. That is all.

Q. 115. Do any of these changes effect the general mode of operation or the interrelation of the parts?

A. No.

In oil well drilling breaking of tools of all kinds is very frequent. Having good luck with the hole they pile the stuff on it to do it quick.

I spent eleven or twelve years in the Sunset field

(Testimony of William E. Youle.)

and drilled fifty-odd wells there. I commenced there without an underreamer. The deepest well I was able to put down in the Sunset field prior to the underreamer was approximately fifteen hundred feet—a little over—with all the modern type tools and appliances that we could buy. That is down on Section 13-11-23. Now, the reason of that was the Sunset field was particularly soft, with alternate hard shelves. I had driven pipe through some of those shelves—punished the pipe a little, but got through and gained a little that way.

After the underreamer came out, wells have been put down over 4,000 feet. There are fields in the Santa Maria that will average 3,600 feet, and they are able to reach that depth. It would be impossible to do it certainly without an underreamer, without any question. You might churn pipe up and down and keep it loose, but if you could not underream that hard rock you could not get the pipe through it.

#### Recross-examination.

The sub of the Double holds with as much security as the threaded pin at the end of the Wilson reamer.

In referring to the Double Improved will state that cutters were to go up in on an incline and be held in position and don't ply back and forth as the cutters did before with the old style of reamer. The changes to the cutters overcame difficulties which had always been bothersome with the old style Double reamer. [87] The sub or upper portion of the Double underreamer body is an essential part of the body. When Mr. Double first called my at-



(Testimony of William E. Youle.)

tention to the improvement to the Double underreamer, (referring to the Double improved) he said, "We have made an improvement in that and there won't be any more trouble with that slipping." Then I said, "Did you ever have any complaint about getting the jaws stuck in the bottom of the pipe?" He says "Yes, we are going to remove that." Am intimately acquainted with Double having had lunch with him many times and liked him very much.

(Complainant's Exhibit Double Patent offered in Evidence.) [88]

**Testimony of Thomas J. Griffin, for Complainant.**

Testifies on behalf of complainant; states that his name is Thomas J. Griffin, fifty years of age, occupation, mechanical engineer, residence Los Angeles. Has been connected with drilling oil wells, first experience in 1876. First experience in Texas. Have drilled in Virginia, West Virginia, Texas, Old Mexico and California. Drilled in Corsicana, Texas in 1880. Went to Ohio in 1884. Was in the mill and well machinery business in Galveston, Texas. Went to Old Mexico in 1904. Drilling for S. Piersch & Son for three years. First experience in California was with the Western Union Oil Company at Orcutt. Have used Wilson and Double Underreamers. Stated that from seventy-five to eighty per cent of reamers used in California are Double reamers. Ten per cent are Wilson. Have used the Mack, the Swan and the Austrian underreamers.



(Testimony of Thomas J. Griffin.)

Q. 44. Will you please compare the mode of operation and interrelation of parts of the two reamers last referred to, Double and Wilson.

A. To begin with the Double underreamer, after the lugs have been put in place and the ring has been slipped over the lugs—

Q. 45. When you refer to “lugs,” you refer to the cutters or bits or slips at the end of the reamer which are the means of cutting the holes, do you?

A. Yes, sir—the reamer is run into the casing, and, as it passes down into the casing, the ring is slipped up by coming in contract with the top of the casing, slipping the ring up until it comes to the square of the tool where the wrench goes on. There the tools are stopped until the ring is removed, usually, and the expansive force of the lug is controlled by the friction [89] on the side of the casing until the tools go to the bottom of the hole, and, as the lugs pass out at the bottom of the shoe, the tension on the mandrel or spring forces the drilling lugs into position expanded. With the Wilson & Willard underreamer, the process is identically the same. To put the Wilson & Willard underreamer together with new lugs, it is necessary to withdraw the Tee-bolt, place over it the spring and guide, securing the nut down to the proper tension or desired tension on the spring, removing the spreading pin, placing the—

Q. 46. You say removing the spreading pin. Where is the spreading pin?

A. At the lower end of the mandrel, placing in

(Testimony of Thomas J. Griffin.)

the tee-bolt. Wait a moment. I want to refer to another part that I should have referred to before referring to the assembling of the spring on the rod. This part is a block or retaining portion which should go on. It should go on the tee-bolt first and the spring placed on top of that with the washer and nut, then the tee-bolt with spring and retainer is inserted into the mandrel and the drilling lugs are placed on the tee-bolt and shoved in the slotted receptacles until a retaining bolt at the lower end of the mandrel can be screwed in, and then the retaining block bolt that is located just above the slotted portion of the mandrel is screwed into position, and then the reamer is ready for the lugs to be pulled down, collapsed, and placed into the top of the casing.

Q. 47. Do you use a similar ring to which you have just referred in the Double?

A. We use a similar ring in the Double before putting the tool in the casing.

Q. 48. And the ring operates in the same manner?

A. The ring operating in the same method as the Double. To assemble a Double Reamer, it is necessary to have the top or sub [90] taken off; then placing the spring and spring-mandrel in at the top of the reamer, shoving it down through, placing the reamer lugs into position, using the retaining key at this point to insert into the lugs through the rod or mandrel. I wish to correct myself. Through one side or one lug, then through the mandrel and the other lug, and placing the



(Testimony of Thomas J. Griffin.)

retaining keys in the outside of the retaining key to prevent it from coming out. The lugs then are pulled down to their lower extremities from below the shoulders, collapsing the lugs, being held in position by the usual ring, and the tool is ready to go into the hole after placing the sub or screwing the sub on top of the hollow mandrel. Now, with the Wilson reamer, the lugs brought down and the ring placed thereon, the tools are ready to enter into the hole. As the tools go down the casing, the lugs are retained in position, collapsed, by the friction of the casing until the lugs pass out through the shoe at the lower end of the well casing, and as soon as they do they are expanded into their full size, their largest size, so that the tools can proceed to drill or ream the hole the desired size. After the hole has been reamed to a sufficient depth or the tools are desired to be withdrawn as the tools start out of the hole, coming to the bottom of the shoe, which is on the lower end of the casing, the lugs by friction are pulled down until they pass clear of the retaining pin in the Wilson reamer and by friction are held there until the tools get to the top of the casing; and the time the tools are leaving the top of the casing, the usual ring is slipped over and comes in contact with the lugs and the lower part of the mandrel and holds them in position while the tools are withdrawn from the top of the casing and swung out of the way. In the Double reamer, the action is identically the same, the lugs being held in position until they got out of the casing, and they



(Testimony of Thomas J. Griffin.)

are there held in position by the usual ring and swung out of the way. [91]

(Resumed.) When the tools and reamer are desired for the purpose of enlarging a hole that has been drilled prior by the ordinary bit to any desired depth below the shoe or in the casing, and the object of the underreamer and operation of the underreamer is for the enlarging of this hole to a sufficient size to allow the casing and couplings to go through, the rock or hard portion is reamed out by first placing the rim and contracting the points of the underreamer; you lower the underreamer into the hole, and it gets below the shoe or casing and the expansion at once takes place, caused by the tension on the tee-rod or mandrel, expanding, thusly pulling up the cutters on an incline at the bottom or lower end of the mandrel, thusly forcing them out and pulling up against their shoulders. Then the drilling line and the beam is brought into use, hooked up in the usual method, and engine starting up underreaming proceeds by the upward and downward movement of the reamer until such depth has been attained desired, or the underreamer bits or lugs have become dull, or it is necessary to run the bailer, clean out. Then the reamer is withdrawn from the hole for such purpose.

When the underreamer is being reciprocated in the well-hole to enlarge the hole, the underreamer and string of tools is turned by the action of the drilling line, and drilling line being laid in similar to rope and the working upward and down of the

(Testimony of Thomas J. Griffin.)

string of tools keeps the tools constantly swinging and turning in first one direction and then the other, thereby eliminating any possible danger of the underreamer drilling a key-way through hard substance. In early days they used a wrench or some other means to continually turn the drilling line, suspended with the tools at the lower end, backwards and forwards to cause this changing of position, but we found by actual practice that that was unnecessary. [92]

The interrelation of the parts of the Wilson exhibit underreamer and the Double exhibit underreamer are identically the same. The operation from the driller's standpoint are the same. The operation in drilling is the same. The actuation of the mandrel or tee-rod is the same; the slotted extension of the two reamers are the same; the construction of the lugs is the same, or their mechanical action is equivalent. There is a slight difference in the sizes of the slotted extensions and angles. Otherwise they are identically the same tool. The means for holding the cutters or bits from being pulled out sideways, namely, dovetails, are the same in the Double reamer as in the Wilson. The Wilson reamer has the same dovetailed arrangement and slotted extension. The cutters are mounted the same except that Wilson has a slotted tee-rod and Double uses the key sliding through a key-way at the lower end of the spring actuated mandrel. The tilting action of the cutters is identical. In both the Double reamer and the Wilson reamer the slots in the bits in which the head of



(Testimony of Thomas J. Griffin.)

the spring-actuated rod operates are larger than the head of the rod. The integral portion of the slotted extension of the Double reamer being a metallic portion at the center is for the purpose of giving the reamer additional strength. It does not have any effect in the expansion of the bit. Have seen a great many Double reamers in use. Double reamers are made with different widths of cutters depending on the style of reamer. The purpose of the different width of wide cutters is to increase the cutting surface circularly and to give it additional driving strength on its shoulder. To decrease the width of the cutter makes the drilling slower. The wider cutter is the more desirable. The difference in construction is merely a workshop selection. The old Double reamer used the narrow cutters. The old Double reamers had shoulders at the sides of the shanks near the bottom. I have seen such reamers recently, having been through the [93] Union Tool Company's shop. These were new reamers of the large and small sizes both. It would make no difference in the mode of operation or the inter-relation of parts in the Double reamer if the center portion or the spreading surface at the bottom were cut away and the spreading were secured entirely by the sides of the shoulders. In this regard the mode of operation of the Double underreamers and the Wilson underreamer is a mechanical equivalent of the other. The first underreamer I used was in 1892 in the West Virginia fields. It was the Mack reamer. The old Mack reamer had a spring-actuated rod



(Testimony of Thomas J. Griffin.)

hinged or put together with a lug coming out of the side of the mandrel and wedging down between the cutters for the purpose of expansion. I tried to use it for about three months but abandoned it as casing would not follow. The patent to Mack No. 496,317, dated April 25, 1893, shows the reamer I refer to. Then tried the Austrian reamer with no success. The well was lost because the tools got stuck in the hole with the reamer on the bottom of the tools. The rope was parted and we failed to recover the tools. Underreaming was necessary in the West Virginia field at that time. The Mack and Austrian underreamers were the only ones we had. The next underreamer I used was in Corsicana, Texas, in the year of 1895. It was a Swan reamer and I also used the Austrian reamer there. Put down one well with the Swan reamer. Well was about 1,100 feet deep. Had only two small shells to ream which we did with the Swan. The Swan did not give satisfaction. We had a drive shoe at the bottom of the casing. We were using what was known as drive pipe and what we didn't get out with the old Swan and the Austrian we broke off and then drove the pipe through. Next use of underreamers was in Texas where I contracted to drill a 2,000 foot artesian water well. I used Mack, Swan and Austrian reamers. I was continually changing from one to the other, trying to get [94] the best results. I had absolutely no success with either of these reamers, as I had to pull the casing and start the hole over with a larger bit to enable me to get down to the proper depth. In 1900 I tried

(Testimony of Thomas J. Griffin.)

to use a Mack underreamer at Spindletop. I failed as I could not enlarge the hole. Lost two wells on account of losing the tools in the bottom of the well. Next use of underreamers was at the Isthmus of Tehuantepec where I used the Mack, the Austrian, the Swan and the Double.

Q. 108. How did you come to use all four of such reamers in drilling such wells?

A. We had the Mack and the Austrian and the Swan on the lease, and as several had tried prior to my going down there to operate the lease and they had made a failure of it, Mr. Bodes, the general manager of Pierson & Sons of the City of Mexico, asked me did I know of another underreamer; that they were having a great deal of trouble with the underreamers that they had; that their trouble seemed to be the underreamers and he wanted to know if I knew of another underreamer. I told him that I had not used the other underreamer, but I understood that it was a very fine underreamer and I had been told by some friends of mine from California that they had used the Double underreamer up in the Kern River field, and that they had reported to me that it was perfect. He asked me did I know whom to get the reamer from. I told him that I did not, but I presumed that the Oil Well Supply people of Beaumont, Texas, could secure them an underreamer. He said "All right; I will wire them or our agent in New York to secure the underreamer and ship it down by fast boat to Vera Cruz and get it to you as soon as possible." You go on down and take charge



(Testimony of Thomas J. Griffin.)

of the lease and do the best you can with the old underreamers." I did so. The first well that I went in with the old Austrian underreamer, after drilling several days I found that it was cutting what I thought to be a circular [95] thread or key-way in the rock, and I ordered the driller to pull out the reamer. He said he had had it out about two hours before and put on new or sharp lugs, and that he didn't think it was dull. I says, "Pull it out and let us see what we are doing." He started out with it and his lugs were off—they were turned up, rather—and formed a wedge, and he jarred about forty-eight hours trying to loosen them up, and finally whipped off the line from the rope socket and left the tools in the hole. After fishing several days I got hold of them and tried to get the tools out and lost another string of tools in there and eventually had to cut the casing and shoot it off above the tools and side-track them. But I didn't do that on that well until after I got the Double reamer.

Q. 109. Explain what you mean by sidetracking in the last answer.

A. We term sidetracking in drilling where we have a crooked hole or have lost tools in the hole and have to drill through and start above the obstruction by filling in the hole with rock or old iron or brickbats or something of the kind and either inserting a shoe or wedge and starting in to drill at the side of the casing and making a new hole from that point down.

Q. 110. Go ahead and finish your testimony in regard to your experience on the Isthmus of Tehaun-



(Testimony of Thomas J. Griffin.)

tepec with the underreamers referred to.

A. During my wait for the Double reamer that did come by way of New York,—as the boats were only sailing from New York to Vera Cruz,—I put in the Swan underreamer in another well and lost the lugs. I put on another set and went down and tried to drill them out of the way. The lugs turned over on me, pulling up through the shoe of No. 11 well, and I jarred for about forty-eight hours on that and finally lost that string of tools. I fished for them and got hold of them but never was able to get [96] them out of the well. The result was that I had another sidetracking job on No. 11. After the arrival of the Double underreamer—we had practically suspended operations except on two other strings of tools that we were running where we had not got down to the shell formation—we waited for the Double reamer. I went into the original one where I had first lost the tools and drilled through and went in with another string of casing and went on down. As I drilled through the side of the casing, I had to enlarge that and I ran the Double underreamer in and drilled off the old iron and sidetracked the string of tools successfully.

Q. 111. How deep did you complete that one?

A. 2,100 feet, when we drilled into salt water and abandoned the hole.

The next underreamer used was at Torreon, Mexico. We used the Double reamer and finished the contract with it successfully. My next experience was in Los Angeles on the Niles Lease in the Salt

(Testimony of Thomas J. Griffin.)

Lake oil field. Used Double and Wilson reamers there. We borrowed a Double reamer from the Salt Lake oil people. They had been using Wilson reamers exclusively. The introduction of a successful reamer was the greatest blessing that was ever bestowed on a driller or oil company. Prior to the introduction of the successful underreamer it was a long, tedious and expensive operation to get a hole in a great many of the oilfields over 1,500 feet deep. The Double reamer was the first successful reamer. I do not consider the Swan, Mack or Austrian underreamers successful. I never saw one of them that I considered successful or even safe to go into a hole, and at the present time I would not attempt to put one of them in a hole.

When the underreamer was working in hard rock or drilling in iron, such as we often have to do in drilling up a joint or two of pipe, my experience with the Wilson underreamer was that the iron or hard rock would lodge in between the expanded lugs, wedging the lugs out expanded, and breaking the lugs off by the [97] lateral driving strain, in two instances. In three other instances, under my direct supervision, drilling in casing, I would find that the pieces of the casing would enter between the mandrel and the spreading pin, striking on the under side of the spreading pin and bending or breaking the spreading pin in some instances, and in others driving the solid particles of rock up between the lugs wedging the lugs so that when the reamer was started out of the hole coming up to the bottom of the shoe,



(Testimony of Thomas J. Griffin.)

the lugs would not collapse, thereby sticking the reamer in the shoe and necessitating the bringing of jars and jarring the tools, pulling off and leaving in the hole the lugs and pulling the mandrel out leaving the tee-bolt spring and lugs in the bottom of the hole. The Swan reamer I refer to is like that shown in the drawings of the Swan patent No. 683,352, dated September 24, 1901. I have also had some little trouble with the Double reamer. My greatest trouble with Double reamers is to get the cutters tempered right. I do not consider the diminished portion of the Double underreamer cutter shank a weakness. It is necessary in the operation of the Double Underreamer Cutter. I do not find any such diminished portion of the Wilson underreamer cutter. I consider the Double underreamer cutters have all the strength required to give action. It would not be possible to use Wilson underreamer cutters shown by exhibit, in a Double underreamer body. It would be necessary to make changes in the parts in order to make the cutters of the Wilson underreamer interchangeable with the Double or *vice versa*. I find in the Wilson underreamer no mandrel part or extension or any other construction between the inner faces of the cutter. Still I think there is a slotted extension between the cutter.

Q. 141. Please point it out.

A. I think that the slotted extension of the Wilson underreamer is practically the same thing as the Double underreamer and, as far as the operation is concerned, from the mere fact that [98] the Wil-



(Testimony of Thomas J. Griffin.)

son reamer has a spreading pin at its lower end, which is put in for the purpose of giving the bits the spreading action and also to keep the bits from swinging from side to side. The Double underreamer is practically solid at the end, though it is obvious it could be slotted, as I have seen and used the Double underreamer with the slotted extension out in the same manner or practically the same manner as the Wilson underreamer before me.

Q. 142. When the slotted extension was out in this Double underreamer that you have just referred to, was there a pin put across between the cutters similar to the pin that you have called the spreading pin in the Wilson underreamer?

A. No; it was not necessary. When the pin is out of the Wilson underreamer the faces which spread the cutters apart are entirely separate or spaced apart. But in the Double underreamer the part which spreads the cutters is one continuous part. Inasmuch as the Wilson underreamer is an extended fork it is not necessary to have a slot. The Wilson underreamer has no detachable key such as used in the Double underreamer. The action of the tee-bolt of the Wilson underreamer, mechanically speaking, is a detriment, though it can be used in the Double reamer identically as in the Wilson. I have seen them so used. It would not be possible to insert the tee and tee-head in the lower end of the body or mandrel of the Double underreamer as is done with the Wilson underreamer, as shown in the exhibit. If my memory serves me right there is very little

(Testimony of Thomas J. Griffin.)

difference in the width of the body and the shanks of the first Double underreamer cutters I used. They had square shoulders similar to the Wilson underreamer cutters. While the tee of the Wilson underreamer with some changes could be used in the Double underreamer, as it is made and exhibited, it could not be inserted at the lower end of the Double reamer. To insert it in the [99] Double underreamer it would be necessary to take off the sub of the Double underreamer body. I will again say that the cutters of the Wilson underreamer when expanding come in contact with the expanding bolt. [100]

Q. 180. In the expansion of the cutters in the Double underreamer, parts of the cutters are always in contact with the slotted intermediate extension, are they not? A. Yes.

Q. 200. Would you please state whether or not it is possible to obtain the expanding action of the cutters in the Wilson underreamer with the retaining-bolt removed?

A. I don't think it would be possible to get the expansion from the Wilson underreamer if the retaining-bolt was removed, from the mere fact that as the tool went into the hole, the retaining-bolt being removed would allow the bit to go into the side of the casing and cut a hole in it, as there would be nothing there to keep it from swinging backwards and forwards and if one side happened to strike a little bit hard on an opening or between joints of pipe and there happened to be a little burr left, or something of the kind, that it would drag on heavier than the



(Testimony of Thomas J. Griffin.)

opposite side, I think that the Wilson cutter would go into the side of the casing. If it didn't, as soon as it passed the lower end of the casing, and the shoe, that if either one of the lugs were to be just the least past the center, that they wouldn't get an even expansion and thereby would rock themselves; and if the pin was left out of the Wilson reamer at the lower end, or retaining-pin, [101] that the Wilson reamer would be inoperative and be worthless.

Q. 201. You are willing to state, are you, that you have never known of the Wilson underreamer having been used without the retaining-bolt?

A. Why, I never saw one used, and I don't think it would be possible, as I think I can clearly demonstrate it by the insertion of the key-bolt and bits, that the reamer would be all to pieces, as it rocks itself about four inches. (Witness, in giving this answer, places the bits and key-bolt in the Wilson reamer in the position or relation referred to by him and rocks the bits in the manner indicated by him.) It would not be necessary to decrease the thickness of the metal in the walls of the Double underreamer or in the cutters thereof, in order to enlarge the bore or longitudinal chamber in the Double underreamer sufficiently to allow the spring carrying stem to be inserted with an integral key head thereon. The tee could be shortened enough to allow it to enter the Double underreamer as it now is and still have ample room to hold the lugs. You would simply elongate the hole at the bottom of the enlarged portion of the mandrel sufficient to allow the ends of the tee bolt to



(Testimony of Thomas J. Griffin.)

slip through. I should say the hole in the Double underreamer would have to be increased about an inch and a half.

Redirect Examination.

(By Mr. LYON.)

Q. 213. You have stated on cross-examination, Mr. Griffin, as I remember, that you could not take one of the bits of Complainants' Exhibit Wilson Reamer and utilize that particular bit in Complainants' Exhibit Double Reamer? A. As constructed.

Q. 214. Why not?

A. For the reason that Mr. Double has seen fit to put in a [102] metal in the bottom of his mandrel to strengthen and to obviate any possibility of a break—of the mandrel breaking; but the Wilson bit can be used in the Double reamer, as exhibited, by the elongation of the slot and the tapering, which is nothing more than mechanical, tapering the center of the mandrel down to allow the Wilson bit to contract and come together so that it would enter into the top of the casing, and leaving the lug on the side of the Double bit as it now is—or the Wilson bit, I should have said, as it now is—to protect the center, in a manner, from filling in with rock or parts of iron.

Q. 215. The same result could be secured, could it not be cutting [103] away a portion of the inner face of the Wilson bit so as to permit it to collapse over the center integral part of the lower portion of the Double mandrel? A. Yes, sir.

Q. 216. In other words, if I understand your tes-

(Testimony of Thomas J. Griffin.)

timony correctly, the question is simply one of size and proportions?

A. Size and proportion, only.

Q. 217. Now, with regard to the use of the Double bits in the Wilson reamer—is that only a question of size and proportion?

A. Size and proportion.

I have seen Double underreamer cutters which would work in Wilson underreamer bodies. The bit now shown me is a regular 4½" Double bit. It is of a longer type than the Complainant's Exhibit Double reamer. This particular Double bit will operate in the Wilson reamer. Changes have been made to this cutter from the usual Double reamer cutters. The key-carrying hole has been enlarged and the shank has been made smaller to conform to the slotted extension of the Wilson reamer and the metal has been cut away at the back of the shank of the cutter to give it the desired amount of opening or spread. Changes do not affect the mode of operation of the parts—merely changes the difference in sizes. This bit I refer to is marked Complainant's Exhibit Double Long Bit, same offered in evidence, The bearing surfaces of the Wilson underreamer body are parallel or substantially parallel. To extend or elongate the slot in the Double underreamer body to permit the use of a solid key-head would in my opinion be simply mechanical construction. It is obvious. I prefer the type of spring actuated rod and key used in the Double to that in the Wilson, for the reason that the Wilson underreamer head will



(Testimony of Thomas J. Griffin.)

crystallize and break off. While parts of the cutters or bits of the Double underreamer are always in contact with the end of the [104] slotted extension of the Double reamer, that is not the case in the Wilson reamer. The only time that the Wilson lugs are in contact is when they are contracted to their lowest point resting against their retaining pins, or when the cutter is expanded. I never had any difficulty with the Double sub unscrewing. It is the same kind of a joint which connects the Wilson underreamer to the tools. The same kind of a joint which is used on the rest of the tools. The liability of unscrewing the Wilson underreamer [105] is the same as the liability of unscrewing the sub of the Double reamer. I have never seen the Double underreamer cutter that did not have a recess on the inner face for the purpose of causing expansion of the cutters. I do not find such formation in the Wilson underreamer cutters. I have never seen such formation or such recess in the Wilson underreamer cutter, until the one just placed on exhibit a few minutes ago. And that recess is on the Double cutter. The Wilson cutters are always in contact with the inner faces of the prongs. The expansion of the Wilson underreamer cutters takes place by the cutters engaging the narrow side spaces or edges of the prongs, while with the Double underreamer this expansion takes place by engaging the cutters with the broader faces of the intermediate slotted extension. It is preferable with a mechanic who is constructing it how he would desire to make it. With the Wilson



(Testimony of Thomas J. Griffin.)

reamer there are two pairs of surfaces with which the cutters contact while with the Double there is simply one pair. You would have the same number of surfaces in the Double underreamer if you separated the Double central bar into two pieces. And again if the Wilson did not have the cut-away portion at the center of the body you would simply have two pair of spreading surfaces, one on each side. Between each pair of the spreading surfaces on the Wilson underreamer body there is an open space, with the exception of the pin.

**Testimony of Edward Double, for Complainants.**

EDWARD DOUBLE testified as follows:

My age is forty-one; my occupation, president of the Union Tool Company; residence, Los Angeles, California. Have been president of the Union Tool Company for about four years. Prior to that time I was connected with the Union Oil Tool Company. That was the predecessor of the Union Tool Company. I am the Edward Double mentioned in letters patent of the United States, patent [106] No. 734,833. Companies referred to have manufactured and sold Double underreamers. I produce a statement herewith showing the number of Double underreamers manufactured by the Union Oil Tool Company and its successor called the Union Tool Company. This statement I show herewith:

UNION TOOL COMPANY.  
Statements of Double Underreamers  
Manufactured and Sold  
to Sept. 30, 1912.

[illegible]

(Testimony of Edward Double.)

These Double reamers have been sold pretty much all over the United States and in some foreign countries. They have been sold in India, Russia, Japan and Mexico. At the time I invented the underreamer described in letters patent to which I have directed attention, there was not what you would call a successful reamer on the market. The Austrian and the Swan are the only two I have any recollection of. I had personal knowledge of both of those types. The construction of those reamers was too light to stand the work that reamers were put to. This weakness was due both to the construction and design. It was not merely a question of weight of metal or size of parts. [107]

The shop I was then conducting in Santa Paula, California, was a small shop. The Union Oil Company with which I was connected at that time had very little capital in manufacture of oil well tools.

I think it would be impossible to complete a majority of the wells in California without an underreamer, with the cable tool system. This for the reason that so many shells are encountered which would require too many strings of casing.

I first commenced the manufacture of underreamers in the year of 1900 or 1901. Have been making Double underreamers ever since. In my opinion the Union Tool Company furnished eighty-five or ninety per cent of the underreamers used in California fields.

Prior to the time that the Wilson underreamer came onto the market there had been no other in-



(Testimony of Edward Double.)

fringements of my Double patent. I sold underreamers to all the oil well supply stores and most of the large operating companies, prior to the time the Wilson underreamer came on the market.

The mode of operation with the Double and the Wilson underreamers is practically the same, with the exception of a few mechanical changes in the shape of expansion of the cutters, length and size of cutters. The Double has a hollow mandrel with a slotted extension, tilting action slips, spreading surfaces on their inner faces, and the Wilson has all the same features.

All the Double underreamers manufactured and sold, not only by the Union Oil Tool Company but by its successor, the Union Tool Company, since July 28, 1903, have all been marked with the word "patented," together with the date of the grant of said patent, July 28, 1903. I was living in Santa Paula at the time I invented the Double underreamer. The Union Oil Company, a large customer of our concern at that time, was using Austrian underreamers exclusively for their work, and Mr. Lyman Stewart of that company suggested that there would be a fortune for someone [108] who could invent a successful underreamer. That was really the starting point of the underreamer. The first one was made in Santa Paula under my supervision. It was used in Ventura County. This first underreamer did not have any notches in the sides of the mandrel above the upper end of the slotted extension. The slips in expanding bore against the spreading part in the

(Testimony of Edward Double.)

center of the reamer. The inner faces of the cutters bore against the spreading bearing. In all the underreamers I have manufactured there has been a continuous shoulder across the inner face of the cutters for producing the expanding action. The dove-tailed notches in the mandrel of the reamer body I first used about ten years ago. The Swan and the Austrian underreamers were considerably used prior to the production of my reamer. They were used to quite an extent and prior to the time I produced the first Double underreamer. I have seen the Swan and Austrian underreamers in operation prior to the time I devised my reamer. I have seen casing put down in holes which were underreamed with them. California is the only field I have personal knowledge of although I have heard of them being used in Virginia and other fields.

To my knowledge the sale of Wilson underreamers has been quite extensive and I know they have been successful.

**Testimony of Chas. P. Barnes, for Complainants.**

CHAS. P. BARNES, being called on behalf of complainants, testifies as follows:

My name is Chas. P. Barnes, age, 57; vice-president and manager of the California National Supply Company. Our company does a [109] general oil well supply and tool business. We have stores in Bakersfield, Maricopa, Taft, Shale, McKittrick, Coalinga, Brea, Orcutt and Sisquoc. I have been in business in California for about twelve years. We sell Double and Wilson underreamers



(Testimony of Chas. P. Barnes.)

mostly. Sold Double underreamers very largely for the last ten years. During the last two years think we have sold about two hundred Double underreamers and six or eight Wilson underreamers. To a small extent we sold Austrian underreamers prior to the advent of the Wilson underreamer. We also sold Double underreamers before the advent of the Wilson reamer. We did not handle the Austrian reamer very extensively because it did not fill our requirements in California. When the Double first came out it supplanted the Austrian altogether. Since then we have never sold one Austrian to my knowledge. The Austrian reamers did ream after a fashion. They were a failure in California oil fields but I cannot speak as to other fields, having no personal knowledge. I have understood that they did underream under certain conditions.

The Wilson underreamer has operated satisfactorily. There are quite a few of them in use.

**Testimony of S. T. Peet, for Complainants.**

Mr. Peet testifies as follows: My name is S. T. Peet; age, 53. I live in Los Angeles, California, and am manager of the Oil Well Supply department of the Fairbanks-Morse Company. I have been the manager for Fairbanks-Morse Company. I have been the manager for Fairbanks-Morse for about twelve years. We handle oil well tools and practically everything in the way of tools for use in oil fields. During that time we have handled the Double underreamers. We have also bought and sold Wilson underreamers. Prior to the time the Wilson under-



(Testimony of S. T. Peet.)

reamer was on the market, the Austrian, Leidecker, North and several other underreamers were used more or less. After the Double underreamer came out we sold practically nothing else up to the time the Wilson reamer came out. The Double reamer was [110] more practical and efficient than anything else in use prior to that time. I, myself, have never operated underreamers. My knowledge is solely that of information received from the driller. The percentage of the Double underreamer is very large. I can't tell exactly. I believe at least 90 to 95%. We don't stock the Wilson Underreamer to any extent and we do the Double.

Prior to the advent of the Double underreamer we had frequent orders for the Austrian, but not for the Leidecker or North. The Austrian was the principal one sold. It was very unsatisfactory, and prior to the advent of the Double underreamer there was a demand for a reamer. We sold a few North reamers. They were not satisfactory.

Cross-examination.

(By Mr. BLAKESLEE.)

Q. 25. As far as you are informed, the use of the Wilson & Willard—or the Wilson, rather—underreamers, has been attended with success, has it not?

A. Why, I have heard of very few complaints.

Q. 26. You frequently had reorders, I suppose, for Leidecker and North and other underreamers from parties purchasing the same, prior to the advent of the Double underreamer?

A. Yes, we had, for other underreamers.

(Testimony of S. T. Peet.)

(Complainants offer in evidence the Reamer heretofore marked “Complainant’s Exhibit Double Reamer.”)

By Mr. BLAKESLEE.—Objection is made to the offer of this exhibit. If such offer be for the purpose of presenting to the Court a specimen of example of the underreamer disclosed in the Double patent in suit; and if such objection extends to every part and feature of this underreamer exhibit which is at variance with the construction shown in the drawings and description in the specification of said Double patent [111] in suit. This objection is based upon and supported by the depositions taken so far by complainants, and by each part of such deposition which speaks of differences in structure between such exhibit underreamer and the specific structure disclosed in said Double patent in suit.

It is stipulated and agreed that “Complainant’s Exhibit Wilson Reamer” was manufactured and sold by defendant, and that prior to the commencement of this suit the defendant has made one or more of such Wilson reamers. Complainant’s Wilson reamer offered in evidence.

### **Proof for Final Hearing on Behalf of Defendant.**

#### **Testimony of Arthur G. Willard, for Defendant.**

ARTHUR G. WILLARD testifies as follows:

My name is Arthur G. Willard; age, forty-one years; resident of Los Angeles; occupation, manufacturer. I am vice-president of the Wilson and Willard Manufacturing Company. I have been familiar with the manufacture of underreamers since the



(Testimony of Arthur G. Willard.)

year 1898. I am familiar with the Double underreamer as disclosed by patent in suit.

Q. 7. Have you ever experimented in the direction of inventing or producing an underreamer for use in drilling oil-wells?      A. I have.

Q. 8. When did such activity on your part commence?

A. Well, in the year of about 1898, and from that up to the present time.

Q. 9. What were the results, if any, of your first experiments in this line?

Mr. LYON.—Objected to as calling for the conclusion of the witness, and not a statement of fact.

A. Read that question, please. (Last question read by the Special Examiner.) In conjunction with Tom O'Donnell we invented the O'Donnell and Willard underreamer.

Mr. LYON.—We move to strike the answer from the record and exclude [112] it from consideration, on the grounds stated in the objection to the question, and on the ground that it is with reference to a defense not pleaded, as hereinbefore set forth on the record in our objection.

Q. 10. (By Mr. BLAKESLEE.) Please state the circumstances surrounding the production of this invention by yourself and Mr. O'Donnell.

Mr. LYON.—The same objections are noted as to the preceding question, and on the ground that it assumes a fact not appearing in the record.

A. About the year of 1898 I was employed as a machinist, in the capacity of machinist, at the Baker



(Testimony of Arthur G. Willard.)

Iron Works. At that time the firm was engaged in the manufacture of oil-well tools and machinery, and they were called upon to manufacture lugs or cutters for the Austrian underreamer. It occurred to me that a more substantial underreamer could be constructed, and after I had devised what I thought to be an improvement over the Austrian underreamer, not being familiar with the workings of an underreamer in an oil well, I went to a friend of mine, Tom O'Donnell, who was a practical oil-well operator. I showed him some rough sketches of my design. He immediately pointed out features which would be objectionable to the operator; so I made him a proposition that we would go in together or work together on an underreamer of this design. In doing so, I tried to design the underreamer so that it would be practical—so that it would be possible to manufacture the same from a machinist's standpoint. Mr. O'Donnell made suggestions from a driller's standpoint. After we had satisfied ourselves that the design was practical, we applied for letters patent jointly, which was issued to us on that date—whatever the date of the patent is.

Q. 11. (By Mr. BLAKESLEE.) Can you produce the patent you obtained, or a copy thereof?

A. I can. [113]

Mr. BLAKESLEE.—A copy of the patent referred to by witness is offered in evidence as "Defendant's Exhibit O'Donnell and Willard Patent," the same bearing date June 14, 1904, and numbered 762,435.

(Testimony of Arthur G. Willard.)

Mr. LYON.—Objected to, on the ground that it is apparent on the face of said patent that it was not patented, nor did it become a printed publication, until June 14, 1904, which is some eleven months subsequent to the date of the grant and issuance of the Double patent in suit, and said patent is not a part of the prior art, and said patent is incompetent, irrelevant and immaterial for that reason; and upon the further ground that said patent is pleaded in the answer of the defendant solely as a printed publication or patent and is inadmissible under the pleadings for any other purpose.

Mr. BLAKESLEE.—Attention of the court is called to the filing date of this patent, December 8th, 1899.

Mr. LYON.—The patent and exhibit are objected to as incompetent to prove the recital referred to; and objection is made thereto upon such ground, and upon the ground that it is not the proper method of proof.

Mr. BLAKESLEE.—A certified copy of the file wrapper and contents of the O'Donnell and Willard patent will be filed with the record on behalf of defendant as authenticated proof of the day of filing of said patent.

Mr. LYON.—Is such certified copy present?

Mr. BLAKESLEE.—No.

Mr. LYON.—It is not offered at the present time?

Mr. BLAKESLEE.—It is not offered now; no.

Mr. LYON.—Complainants give notice that they will insist upon the completion of defendant's proof



(Testimony of Arthur G. Willard.)

before complainants are required to complete their rebuttal.

Q. 12. (By Mr. BLAKESLEE.) Have you or Mr. O'Donnell, or both of you, ever constructed an underreamer embodying the construction [114] and interrelation of parts and features of Defendant's Exhibit O'Donnell and Willard patent?

Mr. LYON.—Objected to as leading and calling for the conclusion of the witness, and not a statement of facts; not the best evidence; no foundation laid for the introduction of secondary evidence.

A. We have had several manufactured.

The first one was made about six months after the application was filed. One 9-5/8" reamer was made by the Baker Iron Works of this city and was shipped on November 21, 1900, to the El Moro Oil Company in Whittier. I superintended the construction during the course of manufacture. This underreamer I can produce. I will introduce it before my deposition is completed.

I was present while this underreamer was being used in drilling the well at Newhall near the Newhall Tunnel. I saw the underreamer in operation at that time. This reamer was not used to my knowledge in any other place. Prior to the manufacture of that underreamer we had the Hughes Manufacturing Company make a full size wooden model. I cannot produce this model. The driller in charge at Newhall where the reamer was first used was Mr. Lehman. He was superintendent of the Banker's Oil Company in the Kern River Field up to a few



(Testimony of Arthur G. Willard.)

months ago. During my employ at the Baker Iron Works I worked on such reamers as the Austrian, Kellerman, Mack, Swan and O'Donnell and Willard underreamers. The Mack reamer to the best of my knowledge was the same as reamer shown by Kellerman Patent No. 679,384. To the best of my knowledge the Swan underreamer was the same as that shown by patent No. 683,352.

I am familiar with the tools manufactured by the Union Tool Company known as the Double underreamers. I have examined and repaired a number of them. [115]

Q. 45. (By Mr. BLAKESLEE.) You may refer to the patent, if you wish, Mr. Willard.

A. (Examines patent.) Well, at the time we were working on the O'Donnell & Willard underreamer, there were only two underreamers in use, to my knowledge, the first being the Austrian, which has hinged lugs on either side, with a taper-box on the lower end for connection to a drill bit. The operators experienced considerable trouble with these lugs snapping or breaking off, and the Austrian underreamer was only used where it was absolutely necessary to do so in order to lower the casing. The Kellerman underreamer was an end underreamer, with the lugs hinged in the bowl, with a movable wedge between. The Kellerman underreamer also had its objections; and in working on the Austrian and the Kellerman underreamer I was trying to devise some way to meet the objections in both of these reamers, and, as before testified, I went to

(Testimony of Arthur G. Willard.)

Tom O'Donnell and with his help we devised the O'Donnell & Willard underreamer. The leading features of the Willard & O'Donnell underreamer is the hollow-slotted extension which is used as a spreading-bar for the cutters; the cutters being separately mounted on a movable T-bar allow the cutters to be pulled down and around the stationary partition when the underreamer is being lowered through the casing for underreaming, as shown in figure 1; a separate socket or pocket being on each side of the stationary partition; a T-bar suspending the cutters, working within a slot in this stationary partition, surrounded by a coil spring, which is used to keep the cutters in place while the underreamer is being used for underreaming.

Q. 46. Please state the particular advantages in service of this construction.

Mr. LYON.—Same objections.

A. The cutters, being allowed to pull down, close in around the spreading-bar or stationary partition, allow the lower edge or cutting edge of the cutter to hide up or close in sufficiently to [116] that the cutting edge does not engage the casing when same is being lowered for underreaming. This is accomplished by the cutter being slidable, mounted on a T-bar and the T-bar being able to slide vertically in the stationary partition or spreading-bar. These features, to the best of my knowledge, have never been used in an underreamer prior to 1898.

The reamer in evidence known as the O'Donnell and Willard underreamer is just the same as origi-



(Testimony of Arthur G. Willard.)

nally made with the exception of an improvement put on this end, namely, the collar or cross bar at the upper end of the reamer. That collar is for the purpose of engaging the casing while the reamer is lowered through the casing, and to hold the cutters collapsed while lowering the reamer through the casing, and to allow the cutters to be perfectly free so that the lugs engage the casing instead of the cutters. This is the reamer I saw in operation in Newhall. I am not sure as to the date without looking it up. I obtained permission from Thos. O'Donnell to obtain this reamer for an exhibit in this case, he having it in his possession.

I have been connected with the Wilson and Willard Manufacturing Company ever since its organization. I am one of its incorporators. Mr. E. C. Wilson is also one of its officers. I am vice-president and treasurer.

To the best of my recollection the first suit against the Wilson and Willard Manufacturing Company by the Union Tool Company was four years ago last May or June (in 1908). This suit I understand was dismissed two years after that date and a new suit filed. I had knowledge of the first suit and knew when the second suit was brought. My first conversation with Mr. Wilson in regard to the suit was probably in August four years ago, as I remember. That was prior to the preparation of the original answer in the original suit. I took no part in the preparation of the matters to be submitted to the attorneys for the defense of such suit. At [117]



(Testimony of Arthur G. Willard.)

the time suit was brought I think I had some conversation with Mr. E. C. Wilson in regard to the O'Donnell and Willard patent for reamer. To my knowledge Mr. Wilson had knowledge some time prior to bringing the suit. Wilson was also an employee of the Baker Iron Works at the time I was there. He was bookkeeper at that time. I had conversations with Wilson about underreamers in 1899, 1900 or 1901. Mr. Wilson was familiar with the O'Donnell and Willard underreamer, he being price clerk. After the year 1905 I went to Bakersfield as superintendent for the Bakersfield Iron Works. I have never sold or transferred my O'Donnell & Willard patent. I remained at the Bakersfield Iron Works about a year and a half during which time we manufactured the Wilson underreamer. During the time I was with the Bakersfield Iron Works, I did not manufacture any underreamers like "Defendant's Exhibit O'Donnell and Willard Patent." I left the Bakersfield Iron Works in July, 1907. Since this time I have been with the Wilson and Willard Manufacturing Company. Since I have been with the Wilson & Willard Manufacturing Company we made one O'Donnell and Willard reamer. It was practically like the patent drawings. There were a few changes in the bowl there. We put in a couple of extra pockets so as to catch the end of the cutters when the reamer was being lowered in the casing so as to be able to enter the underreamer or lower the underreamer through the casing. I never heard of this reamer after we shipped it about four years

(Testimony of Arthur G. Willard.)

ago. I understand Mr. O'Donnell is a man of means and an oil operator. He was financing my efforts to produce a successful underreamer. Mr. O'Donnell has been interested in a large number of oil wells in California at various times since 1898 up to the present time.

I am a stockholder in the Wilson and Willard Manufacturing Company—within ten shares I own one-half of the capital stock. About the year 1902 or '03 I first noticed the Double underreamer. I was still connected with the Baker Iron Works. Some changes have [118] been made to the construction and design of that reamer. I have known of its sale continuously since that time.

The O'Donnell and Willard reamer made by the Wilson & Willard Mfg. Company in about the year 1908 had certain changes in the pocket within the bowl. That reamer had two pockets, one on each side of a stationary partition. The two pockets were milled into the body so they would be parallel with the outside of the body. These pockets were for the purpose of allowing the upper end of the cutters to extend into these pockets when the cutters collapsed.

Q. 142. And what was the occasion of it?

A. It was to enable the cutters to hang free when passing in or out of the drill-casing.

Q. 143. Then they did not hang free without this device?

A. The tension spring was always on the cutters without that device.

Q. 144. And this was found to be an objection to



(Testimony of Arthur G. Willard.)

the reamer in its use before such device was put thereon.

A. Not any more than the same objection would apply to the Kellerman or the Double reamer. The object in making this improvement was to prevent what the drillers called tying the cutters. That was the sole object.

I have no personal knowledge of what was done with the reamer by the El Moro Oil Company at Whittier. The work at Newhall was done within a year of that time to the best of my recollection. I was in the derrick at Newhall possibly a half day while the reamer was in operation, it being in operation possibly about half of that time. I do not know the depth of the well or how deep they drilled it. Do not know whether they completed the hole with that reamer or not. I have no idea of the time of year that it was. I do not know whether that reamer was ever operated in that well hole on [119] any other occasion than this one time which I have referred. There was no other reamer like that made in 1908. That last reamer was made at my suggestion. I suggested it to Tom O'Donnell. He never ordered another such reamer. I do not know of Mr. O'Donnell having any other of those reamers manufactured except the first. I never saw that operated. The first reamer was a 7 $\frac{5}{8}$ " manufactured by the Leidecker Tool Company. I never saw it in operation. It was at the Baker Iron Works of this city until a few years ago. I do not know what became of that reamer.

The Wilson and Willard Manufacturing Com-



(Testimony of Arthur G. Willard.)

pany are in the business of manufacturing underreamers, circulating heads, oil-well pumps, elevators and a general line of oil-well tools. My object in going to Newhall was to show the men how to operate the new device, namely, the collar and the key to hold the cutters collapsed [120] while running in the casing. At that time there was a good demand for a substantial and successful underreamer. That demand continues until the present day. It is my understanding that the reamer made by the Wilson and Willard Manufacturing Company in 1908 on O'Donnell's order was shipped to the Octave Oil Company at Coalinga and was used by them, I understand, but I have no personal knowledge. I have seen several Kellerman reamers like "Defendant's Exhibit Kellerman Patent." To the best of my recollection I worked on at least half a dozen of them. There are some of them now in the shop of the Wilson and Willard Manufacturing Company which were sent there for repairs and changes. Kellerman was devising a new trip or means for enabling the reamer to run into the casing. He devised this new trip about three years ago. I do not know whether the Kellerman reamer was satisfactory or not. I have seen underreamers run but I have never used one myself.

Some of the Kellerman reamers which have the new trip on were shipped to Santa Maria. Do not know what became of them after that. The reamers which were at the Wilson and Willard Manufacturing Company were not those which were made by

(Testimony of Arthur G. Willard.)

the Baker Iron Works. With the exception of a few changes, namely, grooves in the backs of the cutters for admitting the wedge which spreads the cutters apart, and the tripping device, there were no changes made to the Kellerman reamers that I know of. The Wilson and Willard Manufacturing Company did not make Kellerman reamers exactly like the drawing shown in the Kellerman patent. The trips were put in at Kellerman's instructions. He also gave instructions as to the widths of the grooves in the cutters. The Wilson and Willard Manufacturing Company has never made any Austrian underreamers. There is very little demand for them. They were not designed to stand up to the work of present day underreamers. In making the O'Donnell and Willard of 1908, neither the locking device, as shown in the patent, or the collar of the original reamer were [121] used in that reamer. The locking device was found to be unnecessary. It was found to have no value in the reamer one way or another. The O'Donnell reamer which was used in Whittier was brought to the Baker Iron Works for alterations and was then sent to Newhall. During the time I was with the Baker Iron Works there was quite a number of different embodiments of underreamers made at that shop. Quite a lot of experiments in underreamers were made at that time, namely, from 1900 to 1905. I did not have copies or catalogues for publication of oil tools and machinery. I have had superintendence of the manufacture of the Wilson underreamers through the Wilson and Willard



(Testimony of Arthur G. Willard.)

Company's plant. We have eliminated the side pins, and the key is substituted in their place. The side pins are those holding the block which supports the spring. Spring actuated rod now has a slot in it lengthwise in which the key is inserted. The lower end of the rod terminates in two wings on which the cutters are attached. The head or wings of this sliding rod are smaller than the keyseat in the shanks of the cutters. The dovetails on the cutters prevent them from sliding out and becoming disengaged from the tee. This is about the only change made to the Wilson reamer, over and above its first design. At no time did we ever use a block on the pin at the lower end of the reamer body. We have made reamers eliminating the use of that pin altogether. We probably made fifty or one hundred reamers without the pin. Am familiar with all of the changes that have been made to the Wilson reamer. The change from the block and pin type to the key was to simplify constructions to enable the operator to remove the cutters with less trouble. The object of the retaining pin at the bottom of the Wilson reamer is to prevent the cutters from being lost in case the tee bar should break. That is its principal object and I do not believe it is needed to strengthen the reamer body. The object in securing the O'Donnell reamer was to use it as evidence in this [122] case. When I referred to the hollow slotted extension of the O'Donnell and Willard reamer I mean stationary partition between the cutters, over which the cutters spread. While it is de-



(Testimony of Arthur G. Willard.)

tachable it could be made solid and I consider it a practical device. Mr. O'Donnell did not enter upon any campaign to introduce the O'Donnell and Willard reamer. He simply paid for the model and then tried the reamers out; used them in his well. He operated or caused to have operated, the three underreamers referred to. To my knowledge he made no effort to place these reamers on the market. After the trial of this O'Donnell-Willard at Newhall on the day to which I referred, it was seven or eight years before I saw it again. I did not see it again until after this suit was commenced. I got it then for evidence. It was found on the property of the O'Donnell Oil Company in the city of Los Angeles, laying on a vacant lot. The O'Donnell Oil Company was engaged in developing oil territory. My reason for not making further efforts to manufacture the O'Donnell and Willard reamer was that I became associated with Mr. E. C. Wilson and I considered the Wilson reamer a better reamer than the O'Donnell and Willard reamer. It was because we were engaged in business together in the manufacture of the Wilson reamer that I made no further effort to manufacture the O'Donnell and Willard type of reamer. Comparing the O'Donnell and Wilson reamer, the Double underreamer and the Wilson underreamer, I would say: The O'Donnell and Willard reamer has a cutter on each side of the stationary partition, slidably mounted on a tee-bar, the tee-bar slidably mounted within a hollow-slotted extension, with a tapered bowl surrounding the back of

(Testimony of Arthur G. Willard.)

the cutters. The cutters are suspended on a spring actuated tee-bar, whilst the Double underreamer has a cutter on either side of the stationary partition, slidably mounted on a tee-bar, which is slidably operated in a hollow-slotted extension, the back of the cutter extending through the side of the mandrel, the cutters being provided with dovetailed shoulders [123] fitting in tapered dovetails in the lower end of the reamer, I should say fitted on the taper dovetail on the lower end of the reamer. Its cutters are suspended on a spring-actuated tee-bar. The Wilson underreamer has a cutter on each side of the forked mouth underreamer with projecting lugs used as spreading bearings, slidably mounted on a tee-bar. The cutters are suspended on a spring-actuated tee-bar. The Double underreamer resembles the O'Donnell and Willard underreamer more closely than it does the Wilson underreamer. The only object in pocketing the hole of the reamer made in 1908 for myself and Mr. O'Donnell was to allow the underreamer to be lowered in the casing without tying the cutters. Before that it was necessary to tie the cutters. In designing those pockets in the bowl of the O'Donnell and Willard reamer it left the shoulder at the upper end against which shoulder the ends of the cutters engage while the reamer was being lowered through the casing. Mr. O'Donnell is the superintendent of the American Petroleum Company and a large stockholder in that company; the American Petroleum Company has been drilling



(Testimony of Arthur G. Willard.)

wells for the past four years. I know they are drilling wells right along.

I was in Coalinga about a week ago but was not on the American Petroleum Company's lease. I do not know what kind of underreamers they use. The Wilson reamer has slots in the sides of the mandrels through which the backs of the cutters extend. The O'Donnell and Willard reamer has no such slot. The Wilson reamer has dovetails at the sides of the walls through which the backs of the cutters extend, but the O'Donnell and Willard has not unless you should cut a side out of the reamer body. That is the only difference.

Q. 357. What was the purpose of what you have termed the "clotted extension" in the O'Donnell & Willard reamer?

A. It was used as a spreading-bearing for the cutters, to tilt the cutters over when being lowered into the well, and to [124] expand the cutters when the reamer was in position for reaming. It was slotted to permit the T-bar to work perpendicularly. It also formed a partition between the two cutters to hold them in position.

Q. 358. Was such partition necessary?

A. Yes, sir.

Such a partition is not necessary with the Wilson reamer. However, it is necessary in the Double underreamer. Mr. Wilson and I have been associated together in the Bakersfield Iron Works and our purpose in organizing the Wilson and Willard Manufacturing Company was to go into the business



(Testimony of Arthur G. Willard.)

of manufacturing oil well tools and machinery. The slot in the Wilson reamer to which I refer is the slot about three-eighths of an inch wide and about two inches long extending through the body, the lower edge of which is about two inches above the fork. It is a slot for the key. This slot, of course, has no dovetails. If I referred to dovetails on the slot in answering previous questions it was because I did not understand the question. The slot in which the cutters are mounted, if such can be called a slot, is an opening clear through the mandrel. There is no other slot in the Wilson underreamer body through which, or within which, the cutters could play in tilting or moving, other than the opening between the bearings at the lower end of the mandrel.

**Testimony of E. C. Wilson, for Defendant.**

E. C. WILSON testifies as follows:

My name is E. Clement Wilson; age, forty-two years; residence, 734 Berendo Street, Los Angeles. Occupation, president of the Wilson & Willard Manufacturing Company. That company is the defendant in this suit. I have been president of that company since its organization in 1907. Our business in the manufacturing of oil well tools, chiefly, among which we manufacture the Wilson underreamer. The Wilson underreamer is covered by a patent [125] issued to me in July, 1906. I produce the original copy herewith #827,595, issued July 31, 1906, to E. C. Wilson. Same is offered in evidence. The reamer as we are now manufacturing it is slightly modified from that shown in the patent

(Testimony of E. C. Wilson.)

but the changes are minor and have only to do with means for suspending the cutters.

In probably the year 1901 or 1902 I first took notice of underreamers and their use. At that time I was employed by the Baker Iron Works of Los Angeles and was price clerk for them. In that capacity I made frequent charges for underreamers which were sold or which were repaired. The Baker Iron Works at that time was manufacturing and selling the Austrian underreamers. They also made one or two other makes or inventions of underreamers, but the Austrian was the one they made a regular business of manufacturing.

The Austrian underreamer had been used in foreign countries, and I was informed by Mr. John Eaton, now deceased, and who was formerly president of the Oil Well Supply Company, that his company was the first one to introduce that underreamer in the United States. The reamer was used and sold and advertised pretty generally throughout the oil fields of the United States. I have discussed it with drillers who have used it in practically every field in the country. The underreamer was used in California, to my own knowledge, quite extensively. In fact, there was only one other reamer at the time that seemed to be any rival of the Austrian, and that was a reamer known as the Swan. The Austrian underreamer had its advantages, in that the cutters expanded out to a great extent, which enabled it to very materially enlarge the hole. It was not very strong, and had to be run on the short stroke of the tools, and



(Testimony of E. C. Wilson.)

generally with a sinker-bar instead of with a stem. But it did enlarge the hole, as I have been informed by many of the men who at that time were customers of the Baker Iron Works. [126]

I was employed by the Baker Iron Works from the years 1897 until 1904. During that time I came in personal contact with the Austrian underreamer. During my service with the Baker Iron Works I was virtually given control or management of the sales department of the Oil Well Tools. We sold the Austrian underreamers to the various supply houses also to oil operators. I should say from fifty to one hundred of the Austrian underreamers were made while I was acting in that capacity. They were all shipped or delivered to different firms. We sold to the Fairbanks-Morse Company, California National Supply Company, Union Hardware & Metal Company, and many oil companies among them were the Central Oil Company of Whittier, The Columbia Oil Company of Fullerton, in fact every company operating in those days were using the Austrian underreamers. Many of these companies had several of these reamers.

While managing the Bakersfield Iron Works at Bakersfield, I frequently came in contact with Austrian underreamers. The Bakersfield Iron Works had some of them for rent, and they were used by oil companies in the fields. Since severing my connections with the Bakersfield Iron Works in 1909 I have not seen Austrian underreamers in use.



(Testimony of E. C. Wilson.)

The first Swan underreamer I came in contact with was probably in the year 1901. It was received by the Baker Iron Works for repairs, and we made new cutters for it. It was shipped back to the Company at Newhall. We had several of the Swan reamers for repairs, I mean the Baker Iron Works. These reamers were like the reamers covered by patent #683,352. That was prior to March 1904. I don't remember of ever seeing a Swan underreamer in the field or in the shops except those that were sent in to the Baker Iron Works for repairs and those I saw in the store of the W. T. McFie Supply Company, which was prior to the time I went to Bakersfield in March 1904. [127]

My first step toward the invention of the Wilson underreamer covered by the Wilson, underreamer patent was while I was with the Baker Iron Works, probably during the year 1902 or 1903. My acquaintance with oil-well men frequently led to conversations, discussions, or different tools in use, and there was a frequent reference to the need of a satisfactory underreamer. There was scarcely ever a reamer sent into our shop for repairs that did not lead to a suggestion by some driller or some superintendent that somebody should devise an underreamer which would stand up to the work. I took occasion to ask them what the faults were, and what the weaknesses were, and as at that time the Double underreamer was coming into use that reamer was probably referred to more often than any other. I was told that that underreamer's cut-

(Testimony of E. C. Wilson.)

ters were too narrow, that they did not expand out to sufficient width to ream the hole large enough, and that its narrow cutters had a tendency to "Key-way" the hole, as they termed it. They also said that the middle joint was objectionable, as several of the companies lost the lower half of the Double underreamer in the hole, and they considered that joint weak. They also stated that it was a hard matter to get the Double reamer down in the hole, that they had to tie the cutters together in order to do so, in many cases. And they also said that the cutters themselves were weak; that they bent in the shank, and frequently broke, and portions of the cutters were lost in the hole. They also told that the key and mandrel by which the cutters were suspended was a weak device and should be strengthened some way or other. I asked some of them what opportunity there would be for an invention in that line, and they said that they believed the field had not been exploited, that somebody would come along some time and devise the right kind of an underreamer. I was a poor boy and on a small salary, and it occurred to me that there was an opportunity to make some money, and I commenced to study underreamers and what the requirements were, and tried to devise new ideas and new arrangements, and, if possible, to overcome the faults. I presume [128] I worked on that underreamer for a year before it commenced to formulate itself into any definite shape. I had sketches and drawings in my pocket which I had worked on at odd times,



(Testimony of E. C. Wilson.)

and until, finally, it commenced to assume a certain definite form, and after I had satisfied myself that my design was about right, I made working drawings and studied them over very carefully. I laid these drawings out to scale to see that I would have the right amount of expansion and the right amount of stock properly distributed to stand the strain. I finally had one made up, an embodiment of my design, at the Baker Iron Works' Shop.

The information on which I relied in determining the state of the art at the time I designed my underreamer was from catalogues and from information which I received and gathered from oil well men who were using underreamers. I also was more or less familiar with the underreamers manufactured at that time, including the O'Donnell & Willard underreamer. While I was working on the design of the Wilson underreamer I was informed by Mr. Willard that he and Mr. O'Donnell had applied for a patent on the underreamer which they had made. I believe the first reamer they had made was made somewhere in the east. Since that time I have examined the O'Donnell & Willard Patent #762,435. Since that time I have seen underreamers constructed in accordance with the O'Donnell & Willard underreamer patent. I have examined the O'Donnell & Willard reamer.

The O'Donnell & Willard underreamer differs from the Wilson underreamer, in that it has for its spreading-bearings an extension or wedge-shaped partition, which is hollow, to receive a spring or



(Testimony of E. C. Wilson.)

spring-actuated key or T-rod, and it has a slot in it, through which slot the key or T operates vertically as the slips or cutters are drawn up or down, as the case may be, when in operation. The O'Donnell & Willard underreamer has tapering pockets into which the cutters fit. The cutters differ from those of the Wilson underreamer, in that they have only one bearing-face, which strikes against the spreading wall or hollow slotted extension. [129] The cutters of the O'Donnell & Willard underreamer take their thrust-bearing on the upper face of an annular shoulder on the cutters, also a portion of the thrust is taken at the upper end of the cutter, while with the Wilson underreamers the thrust-bearing is taken at the upper end of the shank of the cutter only. The O'Donnell & Willard underreamer retains its spring in place by means of this hollow slotted extension, which is itself detachable, which serves the purpose of the spreading-bearing for the cutters, also as a seat the spring, and, furthermore, as a guide for the spring-actuated rod and key. The Wilson underreamer differs from the O'Donnell & Willard underreamer in several very material points: First, that the expansion of the cutters is accomplished in an entirely different way.

Instead of having a hollow slotted extension or spreading-bearing for expanding the cutters, it has two prongs or extensions or projections which extend down from the lower end of the body. These prongs have retaining shoulders on the inner walls of same and the lower ends of the two prongs termi-

(Testimony of E. C. Wilson.)

nate in wedge-like projections which themselves form the spreading means for the cutters and also serve as the bearings for the cutters when the cutters are expanded in the reaming position, thus holding the cutters firmly in reaming position. The spring and T of the Wilson reamer are suspended in place by means of a collar, which collar was in turn held in place in the reamer body by means of dowel pins or screws. Unlike the O'Donnell & Willard underreamer, there was no portion or part of the reamer body itself interposed between the cutters when the cutters themselves were collapsed, ready to run into the casing, while with the O'Donnell & Willard underreamer, the hollow slotted extension still remained between the two cutters when the cutters were collapsed in position for running into the casing. The cutters of the O'Donnell & Willard underreamer, after being drawn downward, compressing the spring to do so, tilted over this hollow slotted extension, closing them together; but with the Wilson [130] underreamer, the cutters collapse by simply drawing them down until the shoulders of the cutters were below the spreading-bearings or extensions, which are the lower terminations of the forks of the reamer body. The cutters do not actually tilt over any bearings or any stock of the reamer body interposed between the cutters. In this way its collapsing action differed very materially from that of the O'Donnell & Willard underreamer. When the cutters were drawn down in their collapsible position, there was no material in the reamer



(Testimony of E. C. Wilson.)

body over which they could tilt, as they were below any such stock. The Wilson underreamer has no feature in its construction whatever which in any way resembles this hollow, slotted extension or stationary wedge used by the O'Donnell & Willard underreamer. The space occupied by this wedge or hollow slotted extension in the O'Donnell & Willard underreamer is an open cavity in the Wilson underreamer; there is no material there at all. In fact, that open cavity here would be the space between the two forks of the Wilson underreamer. Another thing, the Wilson underreamer employs a bolt or pin which extends across the mouth of the underreamer, extending from one prong to the other and which acts as a safeguard against the loss of cutters should the T to which the cutters are attached be broken. There is absolutely nothing like that device on any other reamer, particularly not on the O'Donnell & Willard underreamer. The Wilson underreamer cutter has an enlarged body which forms shoulders extending at right angles to the shank of the cutter. These shoulders are so shaped that they ride on these wedge-like extensions or projections of the prongs, and when the cutters are collapsed together, they are held in that position largely by these shoulders resting or bearing against the beveled ends of these wedge-like projections. There is no similar device on the O'Donnell & Willard underreamer. There are other minor differences, but, in the main, those are the chief differences between the O'Donnell & Willard underreamer and the Wilson underreamer.



(Testimony of E. C. Wilson.)

I [131] might add that the body of the Wilson underreamer is one single piece; it has no middle joint in it.

Q. 57. Please answer, similarly, with respect to the underreamer "Defendant's Exhibit Willard & O'Donnell Underreamer."

A. Well, it is evident from a glance at that reamer that its cutters were very broad and that it will overcome at least one of the faults of other underreamers in use at that time by having broad cutters instead of narrow ones.

Q. 58. Aside from that, do you or do you not consider that the other features of advantage remained still to be acquired or produced after the invention of the Willard & O'Donnell underreamer?

A. Yes, sir; those objections remained to be overcome.

Q. 63. Did you ever at any time arrive at a definite determination whether or not your company should manufacture these Willard & O'Donnell underreamers? A. We did.

Q. 64. Please state what the determination was.

A. We concluded that the Wilson underreamer was an advantage over the O'Donnell & Willard underreamer in design, and that it was altogether a better designed underreamer and that it was useless for us to attempt to put the O'Donnell & Willard underreamer on the market in competition with it.

A. 66. The principal differences between the O'Donnell & Willard underreamer and that of the double underreamer are merely differences of slight

(Testimony of E. C. Wilson.)

importance. The O'Donnell & Willard underreamer retains the spring in position by means of a detachable piece of the body. The double underreamer retains the spring in place by making the reamer body in two pieces, the spring being inserted into one and held in place by screwing the two pieces together, as they have a threaded joint. The O'Donnell underreamer has a bowl-like mouth, and the Double reamer is just the same except that certain portions of the outer face of the bowl have been removed, forming open pockets for the cutters. Both reamers are [132] known as what we call end-underreamers, that is, the cutters are attached to the lower end of the reamer body instead of at the sides of the body and above the lower end, such as is found in the Austrian underreamer and the Russian underreamer. Both reamers have spring-actuated cutters, which are slidably mounted, and which, in order to collapse the cutters, it is necessary to pull the cutters downward, compressing the spring on which they are suspended, and the cutters tilt over a stationary wedge or partition, which has a hole lengthwise, or vertically, and which is slotted or mortised through from one side to the other of the stationary wall or partition, forming a slot and giving rise to the name, "hollow slotted extension." Both reamers have cutters attached to a spring-actuated rod or mandrel, and the cutters have recesses or pockets in the backs of same to receive the key which extends through the rod and by which key the cutters are suspended. To set the under-



(Testimony of E. C. Wilson.)

reamers preparatory to running into the casing, the same operation is necessary; the cutters are drawn downward until they collapse together by tilting over the hollow slotted extension; they are retained in the collapsing position by means of a ring or a collar; and then the reamer is inserted into the casing. As the reamer and tools are started down the casing, the ring or collar is then removed and the casing keeps the cutters collapsed together while the reamer is on its descent in the casing. As soon as the reamers emerge from the lower end of the casing, the tension of the spring, drawing upward, and consequently tending to lift the cutters upward, expands the cutters in the reaming position, as they are wedged out in that position by means of the stationary wall or hollow slotted extension, and are held in reaming position by the same hollow slotted extension. The cutters are then expanded to a much larger diameter than the inside diameter of the casing through which they just passed. This expansion of the cutters enables the operator to enlarge the hole in which the casing is being lowered, and which hole has previously been drilled by the usual form of [133] drilling bit. When the reaming required has been accomplished, or when it is necessary for any other reason to withdraw the under-reamers from the hole, the tools are withdrawn upward until the cutters strike against the lower end of the casing or the casing-shoe. This draws the cutters downward, compressing the spring, and allows the cutters to tilt or collapse over the hollow slotted



(Testimony of E. C. Wilson.)

extension or stationary wedge until they have again assumed a smaller outside diameter than that of the internal diameter of the casing, and the reamer and tools are then withdrawn into the casing and removed at the top of the hole. The reaming operation, the method of setting the reamers and running them in or out of the casing, are precisely the same.

A. 67. The Double underreamer has a body of two pieces, which pieces can be joined together by means of threads. The Wilson underreamer has a body of a single piece, there being no joint in it. The Double underreamer body has a hole drilled in the lower half of the same, extending vertically entirely through from one end to the other. It is counter-bored or enlarged at the upper end of the lower half of the said body to admit of the spring and spring-actuated rod. The lower end of the enlarged hole forms the seat for this spring. In order to remove or replace this spring and spring-actuated rod, it is necessary to unscrew the body at this middle joint. This device is very different from the Wilson underreamer body, as the hole does not extend completely through the Wilson reamer body. The spring is inserted at the lower end or the mouth of the reamer instead of at a middle joint, as is the case with the Double underreamer. The spring-actuated rod of the Double reamer has a slot or mortise extending through it from side to side, and through this slot or mortise a detachable key is inserted, and which key extends through the spring-actuated rod and into the recesses or pockets of the cutters. The

(Testimony of E. C. Wilson.)

Double underreamer body also has a projection or a stationary wedge, wall, or partition, extending below the upper [134] ends of the dove-tail pockets for the cutters; in other words, below the thrust-bearings on the reamer body. The hole through which the spring-actuated rod operates, extends also through this stationary wall or partition, making the same hollow. There is a slot mortised through from one face to the other of this stationary wall or partition, which slot is for the purpose of permitting the key to which the cutters are attached to travel vertically as the spring is compressed or extended. The lower end of this hollow slotted extension has tapering faces, making the projection or extension wedge-shaped, and which is for the purpose of expanding the cutters. The Wilson underreamer body has no such projection in its construction. There is no slot in it through which the key is to operate; and, furthermore, it has no detachable key in contact with the cutters. Instead of this hollow-slotted extension which acts as a spreading-bearing for the cutters, there is nothing but open space in the Wilson underreamer body. It certainly is not hollow, nor is it slotted, and consequently is neither hollow nor slotted nor hollow and slotted. The Wilson underreamer body terminates in two prongs or forks, which prongs or forks extend downward below the thrust-bearing, namely, that bearing against which the upper ends of the cutters bear when the reamer is in operation. These two prongs have shoulders projecting inwardly on their inner faces. These



(Testimony of E. C. Wilson.)

shoulders form bearings and rest against similar shoulders projecting at the shanks of the underreamer cutters and by means of which shoulders the cutters are prevented from swinging outwardly beyond a certain limit. The lower ends of these two prongs or forks terminate in tapering wedges, which wedges form the spreading means for the cutters. It is by these wedges that the cutters are expanded in the reaming position and held in reaming position while in operation. The difference in the Wilson underreamer body and the Double underreamer body is very apparent when it is remembered that the Wilson reamer body terminates in two [135] prongs forming a fork, while the Double underreamer body terminates in a hollow-slotted extension. The construction is so very different that different machinery is required to do the work advantageously. With the Double underreamer, the mouth or lower end of the body is machined out by a drill-press and planer; with the Wilson underreamer the lower end or mouth is machined with a milling machine—an entirely different course in manufacture. The shoulders or dovetails of the Double underreamer body are angular, having a tendency to project upwardly and inwardly. The shoulders on the inner forks of the Wilson underreamer body are parallel. The shoulders in the Double underreamer body are formed by planing grooves on the inner faces of the body and at either side of the stationary wall or partition or hollow-slotted extension. There are no such grooves to be found on the prongs or body



(Testimony of E. C. Wilson.)

of the Wilson underreamer body. The cutters of the Double underreamers are so constructed that the sides of the shanks or edges of the shoulders of same, also the faces of the main body of the cutter, are on a plane; in other words, the extreme outer edges of the shanks and the edges of the main body of the cutter, on the sides of said cutters form a straight line. With the Wilson underreamer the shanks are proportionately much narrower than those of the Double, but the body is much wider. The body extends at right angles to the shanks, which forms projecting shoulders on the Wilson cutters. This makes the cutting surface of the Wilson underreamer cutters much greater than that of the Double cutters and enables the operators to cut more of the circumference of the hole at each stroke of the tool, and also prevents key-seating, as it is commonly termed by drillers, namely, cutting grooves in the walls of the hole, into which grooves the underreamer cutters have a tendency to follow at each stroke of the tools, and which, in turn, prevents the complete reaming or enlargement of the full circumference of the hole. The Double underreamer cutter, in order to be tilted [136] over the stationary wall or partition or hollow-slotted extension, has V-shaped grooves planed in the back of the cutter extending crosswise with the cutter. There are no such grooves to be found in the Wilson underreamer cutter, nor are they necessary. Without these grooves the Double underreamer cutters could not collapse at all over its hollow-slotted extension. These grooves leave the

(Testimony of E. C. Wilson.)

shank of the Double cutter weak at that point, as a very material amount of the stock is thus removed. The cutters very frequently bend and break at that place. With the Wilson cutter this fault is overcome, as the stock is left intact the full length of the back of the shank. The spreading-bearings or extensions of the forks on the Wilson underreamer body are very wide, and this gives the cutters a longer swing, as they are collapsed or expanded, and consequently they collapse more completely together when running down the casing and expand out to a wider position than those of the Double. This enlarges the hole to a greater diameter than can safely be done with the Double, as, to obtain the same amount of expansion, it would be necessary for the Double reamer to make a wider or thicker hollow-slotted extension, and, in turn, to remove a still greater amount of stock from the backs of the Double cutters in order to permit them to collapse over the increased thickness of the hollow-slotted extension. This would weaken the Double cutters still more and would render the reamer practically useless, as it would then be altogether too unsafe to run it into the hole. The spring-actuated means by which the Wilson underreamer cutters are suspended, instead of being a rod with a hole mortised in it, and a detachable key, is a single forging. The T of the Wilson underreamer is forged out of a single piece of steel. It is of much greater strength than the device used by the Double underreamer. It is impossible for the suspension means to work loose as does



(Testimony of E. C. Wilson.)

the key of the Double underreamer, and being of much greater strength is much less apt to be broken and thus lose a cutter or [137] both cutters in a hole. If the solid-forged T of the Wilson underreamer should break above the head, it is impossible to lose the cutters, as the safety-bolt will hold them all in place, the cutters and head of the T being so interlocked that it is impossible to remove them while the safety-bolt is in place. If one side of the T should be broken, one of the Wilson underreamer cutters would be lost, but the other one would be held firmly in place on the opposite side of the T. If the key of the Double underreamer should be broken, both cutters are sure to be lost in the hole as there is no safety device, such as is found in the safety-bolt of the Wilson underreamer, to hold those cutters in place. The cutters of the Double underreamer, when collapsing over the spreading-bearing or hollow-slotted extension, tilt over same, but, as previously explained, when the Wilson underreamer cutters collapse together, there is no stock or material in the reamer body interposed between the Wilson cutters over which they could tilt, and hence, they do not tilt over their spreading-bearings as is the case in the Double underreamer. The Wilson underreamer is different from the Double in another important feature, and that is the ability to realize several uses of the reamer body. When the spreading-bearings of the Wilson underreamer body have worn until the cutters are considered too loose, the spreading-bearings or wedge-like projections at the



(Testimony of E. C. Wilson.)

lower ends of the two forks or prongs are cut off and the mouth of the reamer body is machined further back and new spreading-bearings are machined onto the ends of the forks, new holes are drilled in the body, and the body is then just as good as new. This cannot be done with the Double underreamer, and is a feature, of itself, unique from any other make of an underreamer.

The reason why the Double underreamer body cannot be re-machined and used the second time is due to the fact that in cutting off the worn portions preparatory to re-machining, it would be necessary to cut the lower end of the hollow-slotted extension off entirely. That would leave the key-slot open clear through to the [138] end, and consequently there would be no stop, or no means of stopping the downward compression of the spring except the spring itself. That would allow the cutters to be withdrawn entirely out of the mouth. The only way that body could be used at all would be to cut the entire mouth off of the lower end of the body and re-machine an entire new mouth. This would entail as much expense for the shop work as is necessary to make a new body; hence, there would be no advantage in re-machining.

Another important difference between the Double underreamer and the Wilson is the difference in results caused by the wear of the cutters on the body. The Double underreamer, having a hollow slotted extension, takes up the wear, of course, the full width of the hollow slotted extension. This wears

(Testimony of E. C. Wilson.)

the spreading-bearings on the body until they are in some instances quite thin. The downward stroke of the key in its slot, when the cutters are collapsed, allows this key to strike on this bearing portion which is being worn thin by the cutters and splits its way entirely through the lower end of the reamer body; in other words, elongates the slot, until it splits the lower end of the body. This is one of the most notable weaknesses of the Double form of construction. When such occurs, the reamer is useless, as the cutters can then be very easily lost off the reamer body, even though the key and rod have not broken, as the cutters can be drawn entirely out of the pockets in the reamer body. Some attempt to repair the body by riveting steel plates across the end, thus building up the worn faces and forming a new stop for the downward thrust of the key; but I am informed that the job is never very satisfactory, as the plates thus riveted on have a tendency to shear the rivets.

Mr. LYON.—(Interrupting.) We move to strike that portion of the answer from the record and exclude it from consideration in which the witness says, "I am informed," on the ground that the same is incompetent, not the best evidence, hearsay; and [139] request that the witness confine his answers to matters which are within his own personal knowledge.

A. (Continuing.) It is very evident that hard steel plates depending altogether on rivets through said plates would have a great shearing



(Testimony of E. C. Wilson.)

strain on these rivets when repeated heavy blows are applied to the upper edge of the plates driving the plate against the rivets. There is no such trouble as these referred to with the Wilson underreamer, as all of the wear which is necessary to keep the cutters expanded to reaming position is applied to the spreading-bearings at the lower ends of the forks. There is no amount of wear which could be applied to those bearings which would in anywise affect the safety of the underreamer, as there is in the case of the Double, there being no slot in the Wilson underreamer body for the suspension-means to travel in; consequently there is nothing for the suspension-means to strike against, the downward compression of the spring being limited, not by the lower extremity of the key-slot, as in the case of the Double, as the Wilson has no such key-slot, but by a piece of pipe which is placed over the T-bar and underneath the spring. This pipe is cut to such a length that when the spring is compressed to the point desired, the pipe strikes against the nut on the T-bar and prevents the spring from compressing any farther. This is a very different operation from that of the Double, as will be noticed. Double has no such pipe in his underreamer to stop this compression of the spring at the proper place. He depends on the bottom of the key-slot.

Another marked difference between the two reamers is the position of these expanding or spreading-bearings for the cutters, in relation to the retaining shoulders on the reamer body, or dove-



(Testimony of E. C. Wilson.)

tails, as they are commonly termed. The Wilson underreamer is so constructed that these spreading-bearings project downward a very considerable distance below these dovetail shoulders. Thus, [140] the cutters are braced, down close toward the lower end, at which point of the cutters the greatest strain is applied, namely, the strain which tends to crush the cutters inwardly as they are being used or as they are reaming in a hole. The hole has a tendency to form into a funnel-shape, thus constantly crushing the cutters towards each other. That is the reason why it is necessary to have the cutters firmly braced apart by means of some form of a spreading-bearing while the cutters and the reamer are in operation. Otherwise this inward thrust or strain on the cutters would have a tendency to keep them almost constantly collapsed so that they would not enlarge the hole to the size required. And, as previously stated, the projecting ends or spreading-bearings on the ends of the prongs of the Wilson underreamer body extend downwardly to a point where this strain above referred to is taken up at the strongest portion of the underreamer cutter and allows the strain to have a very short leverage against the cutter. This leverage, in most instances, with the Wilson underreamer is probably not more than one and one-half to two inches, while the leverage with the Double underreamer applied against the cutter is, in most instances, from four to five and sometimes six inches. Thus, the strain applied to a Double cutter, owing to the increased

(Testimony of E. C. Wilson.)

leverage on same, is probably twice if not three times as great as the same strain would be on the Wilson underreamer cutter. And this is due to the fact that with the Double underreamer this spreading-bearing does not project below the dovetails or retaining shoulders on the reamer body; in other words, the lower end of their spreading-bearing is virtually flush with the lower ends of the retaining shoulders or dovetails of the Double body. This feature, alone, is one of the very great advantages we claim for the Wilson underreamer and is one of the reasons why there are so very few Wilson underreamer cutters that are ever bent or broken.

Another point of very marked difference is the difference in [141] the angles of the bearing-faces of these spreading-means on the Double and on the Wilson underreamer body. The faces of these spreading-bearings on the Double underreamer, namely, the faces of the hollow slotted extensions on which the Double cutters rest when in the rearing position, are parallel, while those on the Wilson underreamer body are tapered; in other words, project downwardly and inward. The advantage that the Wilson has over the Double is as follows: When running an underreamer there is a constant tendency for the cutters to wedge in the shell or in the hole in which it is reaming. With the Wilson underreamer, the first upward action of the tools frees the cutters from their wedged position in the hole, as they commence to collapse instantly upon the return stroke of the tools. They free more easily at



(Testimony of E. C. Wilson.)

the initial action of the return of the tools for the reason that the compression of the spring at that point is very much less and consequently requires a much less force at the beginning of the collapse stroke than is required at the lower end of the collapsible stroke of the cutters. With the Double underreamer the cutters do not commence to collapse until they have been drawn downward on their parallel faces to almost the entire length of the compression stroke of the spring; in other words, the Double cutters do not commence to collapse until a very heavy tension has been placed on the spring. They then collapse very quickly, and at a time when a comparatively high tension is on the drilling line. The elasticity of the drilling line, when under a heavy strain suddenly relaxed, causes the line to jerk the tools high in the hole; they will then descend with much force into the hole on the return stroke of the beam; and has a greater tendency to wedge in the hole at that stroke than before, and this operation is repeated at every stroke of the Double underreamer—in other words, the Double underreamer has a great tendency to plunge in the hole and is a fault which is practically overcome by the Wilson reamer by reason of its tapered spreading-bearings. [142] This feature alone is one very often mentioned as among the advantages the Wilson reamer has over the Double.

Another great advantage of these tapered bearings is the ease with which the Wilson underreamer is withdrawn into the shoe or casing. The cutters



(Testimony of E. C. Wilson.)

commence to collapse the moment they strike the shoe, and gradually close together until they are withdrawn into the casing. With the Double the cutters do not collapse until the full strain necessary to collapse the spring has been applied, and, in so doing, the bearing-shoulders very often wedge in the shoe, making it necessary to hook onto the temper-screw and jar the underreamer into the shoe. In so doing, much risk of breakage is incurred, as the strain is applied directly to the cutters and suspension-means, and many a Double underreamer cutter is lost in the hole, or at least bent, in withdrawing the underreamer into the shoe.

It will be noticed that these various differences between the construction of the Double underreamer and that of the Wilson all have a purpose. In designing the Wilson underreamer I had very clear ideas of what would be necessary in order to overcome the faults of the Double. Every change I have made was with a view to strengthening the cutters or to widen them, give more cutting surface or to enable the cutters to be expanded to a wider position, to guarantee a well-reamed hole, and to make the suspension-means stronger than that of the Double, and to overcome the complaints due to the middle joint of the Double, to make stronger dovetails on the reamer body and on the cutters, to make stronger shanks on the cutters, to make a reamer which would run in or out of the casing more freely and avoid the necessity of tying the cutters together, as was the case with the Double, when running down

(Testimony of E. C. Wilson.)

the hole, and to make an underreamer which would give the maximum amount of service, which we can do by re-machining. I also realized that it would be necessary to use an entirely different form of construction, [143] otherwise I would infringe on somebody's patent. Consequently, I started in with my invention from an entirely different source, namely, a type of underreamer body known as the forked mouth underreamer body, which was in strong contrast to those reamers using hollow slotted extensions or spreading-bars or stationary walls or partitions interposed between the cutters.

(Continuing.) I have shown some of the main differences in construction between the Double reamer and the Wilson underreamer. There are other differences, but they are not so important.

I do not find in "Complainants' Exhibit Double Patent" the shoulders at the sides of the slotted extension and the lower end of the mandrel body of "Complainants' Exhibit Double Underreamer" nor the shoulders at the sides of the prongs, and above the spreading surfaces; these latter I find in "Defendant's Exhibit Wilson Underreamer Patent"; complainants have not always manufactured underreamers with such dovetail shoulders above the spreading-portion of the slotted extension. They have been using the retaining shoulders or dovetail shoulders on their reamers ever since they were first made, but they have made a change in the form of the spreading-bearing and that change was made not until almost two years after my reamer was on



(Testimony of E. C. Wilson.)

the market. The Double underreamer as originally made, and made for some time after mine was first out, did not have this V-groove cut on either side of the spreading-bearings and into the retaining shoulders or dovetail shoulders. Looking at the reamer body from the side, they terminated in two faces, angular faces forming a V-shaped projection, and that was their form of construction. They didn't have these V-slots.

I herewith produced an underreamer made up with a V-shaped groove forming this extended bearing. I obtained this underreamer in a lot of second-hand oil well machinery which we bought. Think we bought it of Jamison, the second-hand dealer. It is identical in construction with dozens and dozens of Double reamers I have seen [144] in use and have seen on sale in the different stores. I know of no other firm than the Union Tool Company, complainant in this case, who has been manufacturing reamers of that type. I have seen reamers of that type in McKittrick, Maricopa, Coalinga and other oilfields of the State of California.

The Double underreamer having these relatively narrow cutters and the particular formation at the lower end of the mandrel has not been in general use for at least three years, to my knowledge, this later type of reamer having superseded it, although I understand there are still some of these reamers being made and sold, although the demand is for this reamer here. (Complainants' Exhibit Double Reamer.) It was in 1907 or '08, I should say, that



(Testimony of E. C. Wilson.)

this reamer first came out, that he made his change and virtually abandoned this older type of reamer.

The Wilson underreamer, as previously stated, were manufactured and sold prior to the time the first of these Double underreamers with the V-shaped notch or slot extending the bearings, and with the wide cutters to co-act therewith, were first made.

Q. 88. (By Mr. BLAKESLEE.) Please particularly define what, if any, relation exists between the retaining-pin or bolt, or safety-bolt, which spans the chamber between the prongs at the lower end of the Wilson underreamer and the cutters of the Wilson underreamer.

A. The pin has no relation whatever with the cutters. Its object is simply a safety-bolt and acts as a safeguard against loss of cutters. We have in a few instances had complaints, at an early time—not for a long time, but when this reamer was made, which was a long time ago—that the Wilson underreamer gave trouble to get down the casing, and we found that the trouble was due to the fact that the machinist was not drilling the hole for the safety-bolt at the proper position in the reamer body; they were drilling the holes too far down toward the lower end of the reamer body. When the bolt was in place in a body with the holes drilled in the wrong position in that manner, the cutters [145] would strike against this bolt or strike against this safety-bolt and prevent them from collapsing to their fullest extent. Of course, that was a mistake; the bolt

(Testimony of E. C. Wilson.)

should have been placed higher up on the reamer body to a position where the cutters could not touch the bolt at all when they were being collapsed or being expanded for position. The bolt has absolutely nothing to do with the cutters, and it was a serious mistake when that hole was placed in such a position that the cutters could touch that bolt when being collapsed together or when being expanded into reaming position. I might add that acting on the recommendation of one of our very good customers, we discontinued the use of that safety-bolt altogether, at one time, and made probably twenty-five underreamers, probably more, without that safety-bolt altogether. This brought forth the complaint from one customer that the T-bar he was using had broken, showing a flaw in it, and that the party lost the cutters in the hole, simply because we didn't have this safety-bolt in that body. He notified us that he would use no more Wilson underreamers that didn't have that safety-bolt, to prevent such an accident again. After that we have always made the reamer bodies with the safety-bolt in them.

Q. 89. Please state whether or not you have ever had any complaints as to the operation of the Wilson underreamer concerning the entrance of any objects or materials encountered in the hole into the space between the prongs and above the retaining-bolt.

A. No, sir, we have never had the slightest trouble in that regard.

Q. 90. Should any such objects or materials enter this space, please state what, in the operation of the



(Testimony of E. C. Wilson.)

underreamer, would occur, and why.

A. To begin with, while that safety-bolt is in place, any solid substances or materials which can enter in the space between the cutters and that safety-bolt is very small indeed and it would require a considerable stretch of imagination to find any materials [146] or rocks or gravel in a hole that has been drilled with a bit in sufficient quantities which would just fit in between those cutters and that safety-bolt and accumulate in there in quantities sufficient to give any trouble. But, even should such materials enter between the cutters and this safety-bolt, they could not remain in there long, as this solid-forged T-bead in each stroke of the tools, having a tendency to act on the compression or tension of the spring, would constantly force or pound out in front of it and out at the mouth of the reamer any materials which would have a tendency to collect in there. I have known Wilson underreamers to chop up length after length of casing, and to run on underreamer cutters of other make, and in all sorts of gravel and boulder formations, and in all the years that we have been in this business we have never had one single complaint of the Wilson underreamer packing up with mud or other debris, rocks or iron, in between the cutters in such a manner as to prevent its cutters collapsing freely and easily when drawing into the shoe.

Q. 91. Will you please state whether it is possible to replace the cutters of "Complainants' Exhibit Double Underreamer" with the cutters of "Com-



(Testimony of E. C. Wilson.)

plainants' Exhibit Wilson Underreamer'' and successfully operate the Double underreamer.

A. No, sir; it would not be possible.

Q. 92. Please state why.

A. As I have previously explained, the Double underreamer body has a slotted extension interposed between the cutters. In order to collapse the cutters over this hollow slotted extension, it is necessary to have a certain amount of the stock or material removed from the back of the cutter. This is done by planing a V-shaped groove across the back of the cutter. This groove forms a pocket or space which allows the cutter to tilt over this hollow slotted extension when it is drawn down to a collapsible position. In order to make the Wilson underreamer work in a Double underreamer body, the first thing necessary to do would be to [147] machine that same V-shaped groove out of the underreamer cutter; otherwise the cutters would not collapse at all. And, again, the Wilson underreamer cutters, as made, have very much longer shanks than those of the Double underreamer and would not fit in the Double underreamer body. That is one of the main differences. There are other slight differences in the way they are constructed. Those differences, alone, are sufficient to prevent their being interchanged.

The operativeness of the Wilson underreamer is effected in no manner whatever by the removal of the safety-bolt.

Q. 94. Have you ever seen a Double underreamer

(Testimony of E. C. Wilson.)

with plates across the sides of the slotted extension, the lower end of the same beneath the slot therein?

A. I have.

Q. 95. As far as your information goes, what was the function of these plates?

A. They were simply the means of repairing broken underreamer bodies. The key had split the lower end of the body, and also the body had been worn by action of the cutter until it was so thin that it made an easy matter for the key to split it out, and which causes a situation that is dangerous—the cutters are liable to be lost—and the reamer is patched up by means of these plates.

The Central Oil Company of Whittier, The Amalgamated Oil Company, The Associated Oil Company are a few of the companies which use both Wilson and Double underreamers. They are using these reamers in Fullerton, McKittrick, Coalinga, and other oil fields of the State of California. There are numerous other companies also using both Double and Wilson reamers. In some instances both underreamers are being used, and some instances they are using nothing but the Wilson reamer.

The Section 25 Oil Company, the Central Oil Company, the El [148] Camino Oil Company are now using Wilson underreamer exclusively. They are located in Maricopa, Taft, Whittier, and the Bakersfield's fields. All in the State of California. There have been instances of serious accidents resulting from the use of Double underreamers. I was informed by drillers, also newspaper articles pub-



(Testimony of E. C. Wilson.)

lished at the time of the incident, the Red Top Oil Company of Coalinga lost the lower half of the Double underreamer in the hole, and after fishing for it for probably a month, decided to shoot it out of the way by using dynamite. Two men were killed in trying to do so. The Section 25 Oil Company a short time ago, operating near Taft, lost the lower half of a brand new underreamer in the hole. That was their first experience with Double underreamer for several months. They had always used Wilson underreamers but being in a hurry for a reamer and not being able to obtain the Wilson, purchased the Double with the result mentioned. The Delaware Union Oil Company near Fullerton, running a 15½" Double reamer broke two Double 15½" underreamers, rendering them useless. They finally lost a set of 15½" Double cutters. They also lost a set of 12½" Double underreamers about the same time. This entailed a very considerable loss to them.

Recalled—Direct Examination Resumed.

(By Mr. BLAKESLEE.)

Q. 106. Will you state fully the objects you had in view and the structural and operative results obtained in and by the provisions of the shoulders upon the lower end of the mandrel or body of "Complainants' Exhibit Wilson Underreamer," beneath which the shoulders on the cutters are disposed when the cutters are in expanded position.

A. I have previously explained that underreamers, to be successful, have to have some solid means of expanding the cutters into reaming position and



(Testimony of E. C. Wilson.)

holding them spread apart to full expanded position while underreaming. That was the object of those projections or wedge-like extensions of the prongs. These projections are so designed that they do that very thing. The cutters [149] having shoulders projecting at right-angles to the shanks, extend out far enough to ride up over and rest upon these wedge-like projections on the ends of the forks of the reamer body.

Q. 107. Please state, if you know, what structural and operative results are obtained by forming the notches in the lower end of the body or mandrel of "Complainants' Exhibit Double Reamer" at the sides of and just above the lower end of the slotted extension.

A. By cutting those notches in the shape that we see them on this Double underreamer, in the exhibit, the old or original Double underreamer body is transferred into one which has projecting bearings which extend downward below the ends of the retaining shoulders or dovetails on the reamer body, and by their projection downward they have a tendency to shorten the leverage on the cutter and thus reduce the strain or leverage applied to the cutters, which strain has the constant tendency to crush the cutters together at each stroke; in other words, by that change in the Double underreamer they have added practically—added the same device that I had in my wedgelike projections at the ends of the prongs of the reamer body. I have previously explained that the further down that bearing can be

(Testimony of E. C. Wilson.)

extended and the closer to the end of the cutter at which the strain is applied, the shorter the leverage is against the cutter, and Double, in making the change to his underreamer, evidently strove to get the benefit of the same device that I had on my underreamer, as he has virtually adopted the same form of construction to that extent.

Q. 108. Can you state whether or not, without adopting this construction, it would be possible to apply to the Double underreamer, as disclosed in the Double patent, the relatively broader cutters such as disclosed in "Complainants' Exhibit Double Underreamer"?

Mr. LYON.—Objected to as leading.

A. No, sir; it would not be a practical thing for him to do so, according to the construction of his old reamer. And there is [150] a reason for that, too. I have never seen a cutter before like that shown in Complainant's Exhibit Double Long Bit.

I think I have seen all of the designs of underreamers that Double has had made in the Union Tool Company's Shop. I have been in their shop three or four times from the year 1900 and probably three until 1901 and 1910. I cannot say definitely but do not believe I was in the shop of the Union Tool Company in Los Angeles within two or three years after it first opened up.

The Baker Iron Works to my knowledge never handled Double underreamers. I probably saw Union underreamers or Double underreamers a year or so, probably a couple of years before I went



(Testimony of E. C. Wilson.)

to Bakersfield. I went to Bakersfield in the year of 1904.

I made a wooden model of an underreamer I was working on the year of 1903. I still have that wooden model but it has been modified and changed considerably. It is a model probably 18 inches long. It was the only model I had made during the years 1902 and 1903. Prior to having that wooden model made I had seen Double underreamers. Don't know whether that was before the issuance of the Double patent or not. I think I met Mr. Lyon in Mr. Townsend's office in regard to a casing spear which I was having patented. I don't remember the date. The wooden model is a different form of reamer from that which I later adopted. I did not altogether abandon the form shown by the first wooden model. I changed the cutters somewhat. I was familiar with various makes of underreamers, not only the Double, prior to making the present Wilson underreamer, I cannot say that the Double reamer was most generally in use at that time. There were other reamers in use, namely, the North reamer, the Kellerman reamer, the Plotts reamer, the Austrian underreamer, the Swan underreamer and others. At that time it was a common discussion among oil well men as to the relative merits of the various underreamers,

The main difficulty with the North reamer, as I recollect, was the fact that the cutters would not remain in an expanded [151] position while reaming. They were liable to and did so far as the opera-



(Testimony of E. C. Wilson.)

tor could ascertain, collapse at times with the driller in underreaming. The first North reamer was probably used in 1899 or 1900. I believe I have never seen the so-called North Improved reamer. I have heard of it. The inventor of that reamer was Edward North.

I do not know how many Kellerman reamers were made. Some of them were made by the Baker Iron Works, some were made by the Union Tool Company.

The trouble with the Kellerman reamer was its means for forcing the wedge, the movable wedge, downward when coming in contact with the casing shoes, so as to permit the cutters to collapse. They had some trouble to get the reamer out of the hole. I don't think it ever gave any trouble to collapse. There was no trouble caused by cutters collapsing when in use as the wedge which expanded the cutters remained between the cutters when in use and the cutters could not collapse.

Operators were not altogether satisfied with them. However, they did do good work as I remember at one time while Mr. Kellerman was drilling a hole near College Street, in this City, I was in the rig when they were running a Kellerman reamer, and I asked the drillers about them and they said they were the best reamer to cut the hole and enlarge or ream the hole that they had ever seen. That was probably in 1899 or 1900. I do not remember the driller's name. I also heard men say that the North

(Testimony of E. C. Wilson.)

reamer was the best reamer in use at that time. At that time the Oil Well Supply Company was handling North reamers, the Austrian reamers, and one or two other makes of reamers.

Q. 180—You have referred to a desire upon your part to get a wider expansion of the cutters. To what degree did you desire to get a wider expansion of the cutters?

A. Merely to meet the common demand of the oil men at that time. They had been accustomed to the old Austrian underreamer. [152] which had a tremendous expansion, and they thought that was one thing lacking in the end—underreamers at the time—they didn't cut out wide enough.

It was common practice with the Austrian underreamer to attempt to use the same sized mandrel with cutter or bits of varying sizes in order to secure the use of one body or mandrel for underreaming under more than one size of pipe; this was also attempted with end-underreamers but the extra strain that was thrown on an underreamer having a small body, using a size larger cutter than intended, which threw, naturally, a greater leverage on the small dovetails of the reamer body, owing to the cutters extending out at a greater distance from the dovetails than would be if used in a body of the size intended for the large cutters, was a detriment. I have known of Wilson underreamer being so attempted to be used. The result I speak of was common to all underreamers operated in this manner.



(Testimony of E. C. Wilson.)

Q. 190. You have stated, in answer to question 12 on direct examination, that when you first took notice of underreamers, in 1901 or '02, you were employed by the Baker Iron Works as price-clerk and the Baker Iron Works at that time were manufacturing and selling the Austrian underreamer and they made one or two other makes or inventions of underreamers. What other makes or inventions of underreamers did the Baker Iron Works at that time manufacture or make?

A. They made the Kellerman reamer; they made a reamer for a man by the name of—I believe his name was Hedley. He was the man who drilled the water-hole out in the West Side fields which was the foundation of the Bimini Hot Baths. I believe his name was Hedley.

As I have stated, the first Swan reamer I ever saw was with the Baker Iron Works of Los Angeles and was there for repairs. I believe it was brought in from Newhall. We made new lugs and [153] the spring actuated projection at the side of the body had worn, namely, the tripping mechanism. I never saw a Swan underreamer run in the hole. Dovetails are for the purpose of holding the cutters from swinging outwardly beyond a certain limit. The corresponding shoulders on the shanks of the cutters bear against the inner faces of the restraining shoulders or dovetails of the Wilson reamer, and stop the cutters from swinging outwardly beyond a certain limit.

Prior to the time I made the first Wilson under-



(Testimony of E. C. Wilson.)

reamer, Allen Craig stated to me that he had difficulty in getting the Double underreamer down in the hole. There were so many men that told me that, that I have forgotten who they were.

Probably every man that I talked with about underreamers at that time made the remark that somebody would come along sometime and make up a satisfactory reamer. They all felt that the field had not been exploited and that there was still room for improvement. I do not remember the exact date. I obtained that information when endeavoring to find out just what an underreamer should be.

It was probably a couple of years before I went North that I saw the first O'Donnell & Willard underreamer. I saw it in the shop of the Baker Iron Works. I do not remember how many times I saw it or how long it was in the shop. The O'Donnell & Willard underreamer which is now in the shop of the Wilson & Willard Manufacturing Company was brought there only a few days ago. I do not know where it came from. I don't remember of talking with anyone as to its use, except possibly Tom O'Donnell.

We made one reamer of the O'Donnell Willard type in the shop of the Wilson & Willard Manufacturing Company. I do not know what service it gave. I have heard that the reamer went to the American Petroleum Company at Coalinga, and believe that Tom Crumpton said that they had trouble to get it down the casing but they [154] probably could

(Testimony of E. C. Wilson.)

have used it by tying the cutters together, but that they were trying another experiment. I do not know what became of the reamer.

The only changes to Wilson underreamers that I have made was a change in the shape of the block which retains the spring. The first was a rectangular block and served as a bearing for the cutters as well as a bearing for the spring. Was held in position by means of dowel pins. We later changed to a round block which was held in position by a screw or bolt. The next change was to a slotted tee instead of the round tee. At that time we used a double key wedge. We have since changed the shape and proportion of the head of the slotted tee—made it heavier and are now using a different shaped key. The bodies have been made longer in order to enable us to re-machine them.

The object of re-machining is simply to give a multiple use of the body. We have never made a Wilson underreamer having a block of any kind on the retaining bolt or safety-bolt.

The reason for again using the safety-bolt was to overcome the danger of loss of cutters in the event of a broken tee or a lost key. The breakage to the tee to which I refer was in a flaw at the thread.

If one prong or head of the tee-head would break off one cutter would be lost—nothing would hold it.

In mentioning dovetails of the Wilson underreamer I refer to the retaining shoulders or angular bearings on the inner faces of the prongs of the



(Testimony of E. C. Wilson.)

reamer body. They are commonly called "dove-tails."

The only slot in the Wilson underreamer body is a slot which we are now making, but which does not appear in the original drawings at all, and that is for the key which acts as a seat for the spring. The opening through the bottom of this underreamer, such as "Complainant's Exhibit Wilson Underreamer," is clearly expressed when we use the term "Forked Mouth Reamer Body." Willard [155] was the man who told me about the difficulties they had in getting the O'Donnell & Willard reamer down the hole. Willard stated that he could make some changes in that reamer which would make a good reamer out of it yet. Willard stated that they had found from that trial that it could be made a successful reamer by making certain changes. I discussed that with Willard several times. We have always felt that the Wilson reamer was the right design of reamer and it would be useless to attempt to introduce something that did not seem so good. Therefore, we never considered seriously the making or sale of the O'Donnell & Willard reamer.

That portion of the O'Donnell & Willard reamer which I term the "Hollow Slotted Extension" or "Spreading-bearings" for the cutters, is that portion which is interposed between the cutters and which projects downwardly, beginning at the point in the body against which the upper end of the cutters bear when the reamer is in operation. It is the "Verti-



(Testimony of E. C. Wilson.)

cally slotted wedge-shaped projection, 3, extending across the socket, 2." The slot is designated in the O'Donnell & Willard patent as figure 4. Its purpose is to permit the spring-actuated tee or cross-head, 8, to which the cutters, 12, are suspended to travel vertically as the spring, 10, is compressed or extended. There is a hole in the extension also that is drilled vertically extending from its extreme upper end down into the slot, 4. It is this bore, 6, and the slot, 4, which designated that portion of the reamer as the hollow slotted extension. Relatively that same place in the Wilson underreamer is an open space entirely unoccupied and vacant except for the safety-bolt. In order to make that opening the same in the Wilson underreamer as in the O'Donnell and Willard underreamer it would be necessary to cut out those pockets or dovetail ways through the bowl of the O'Donnell and Willard reamer. There is nothing in the O'Donnell and Willard underreamer that shows any dovetail ways as they appear in the Wilson reamer. The cutters of the O'Donnell [156] and Willard reamer do not expand out through the periphery of the body.

The width of shanks of the Wilson underreamer cutters depends on the size of the reamer. The cutter is so proportioned as to give it as much strength through the shank as can be done safely and consistent with the proportioning of the rest of the reamer. The 6" reamer which you have in your office is a correct embodiment of the Wilson underreamer and shows the key as we are now making it. We still use the safety-bolt as shown here. The bearings on

(Testimony of E. C. Wilson.)

the upper ends of the cutters on this reamer you now show me are somewhat worn and the bearings are no longer at right angles as originally made. The wear has a tendency to shorten the shank of the cutter and to change the angularity at the upper end of the cutter. That wear would have nothing whatever to do with the expansion and contraction of the cutters. So far as I can see this reamer is just as when we made it except that wear to which I have referred. A certain amount of wear takes place on all reamers that have cutters slidably mounted and that have spreading-bearings between the cutters. A slotted tee and key makes no change whatever in the mode or manner of expansion or collapsing of the cutters. It requires a different operation to remove or replace the cutters. The Wilson & Willard Manufacturing Company are now manufacturing and offering for sale underreamers like this "Complainant's Exhibit Reamer No. 2."

We substituted the slot, slotted T-rod, and the key, for the reason that the device that we had previously used, namely, the detachable block and threaded screws, would sometimes give trouble by rusting or sticking the thread-screws when used in the water and mud and the reamer, then set aside without being used for some time, would rust and the next time the driller had occasion to use the reamer and to remove the cutters, he would occasionally have difficulty in removing these screws in order [157] to remove the block and T and cutters. We have no



(Testimony of E. C. Wilson.)

such trouble with the slotted T and the stationary key which we use.

Q. 304. Do you consider that this change in any manner affects the mode of operation or principle of the Wilson reamer as exemplified in "Complainants' Exhibit Wilson Reamer?"

A. It does not affect the operation any. It is simply an improvement making the device more convenient than before.

I believe "Wilson Complainant's Exhibit Wilson Reamers" is in condition to use now. The Baker Iron Works continued to manufacture Austrian underreamers until I left there in March, 1904. I do not know how many Austrian underreamers they made. In 1906 to 1909 we had three or four Austrian reamers in Bakersfield Iron Works shop for rent. They had no Double underreamers for rent. I believe we sold and repaired Austrian underreamers for the Columbia Oil Company. I do not remember exactly, but probably I first saw a Double underreamer in 1901 or 1902. It was probably in the year 1903 that I took a wooden model of an underreamer to the office in which Mr. Lyon was employed. My object was to determine what patent rights I could obtain on that device. The cutters of that model were scissor-action and the cutters expanded by striking against the inside bowl at the upper end. When expanded they jumped up onto a spreading bearing on the edge of the bowl of the reamer. This was done by a spring actuated rod. The shanks of the cutters



(Testimony of E. C. Wilson.)

were held within a bowl of the reamer body. I decline to produce the model until the time stated by my counsel.

Certain changes have been made to the model since I first designed it. It is different from the Wilson underreamer we now make. Changes were made prior to manufacturing the first underreamer. The model originally made did not have the V-shaped point on the spreading-bearing. It changed the mode of expansion of the cutters. The first Wilson reamer was made like "Complainant's [158] Exhibit Wilson Reamer" was made in the early part of 1904 or the latter part of 1903. If Dick Smith, present foreman of the Union Tool Company Shop, the complainant in this case, was working in the Baker Iron Works at the time my first reamer was made; probably he worked on it at the time. I knew Arthur Willard in 1903. We discussed underreamers at that time. He always believed the O'Donnell and Willard reamer would do good work. In 1904 I took Arthur Willard to Bakersfield to act as superintendent of the Bakersfield Iron Works. We had no interest in the Bakersfield Iron Works; he was simply an employee of the firm. We had no idea of engaging in the manufacturing business at that time. While I was experimenting with underreamers in 1903-1904 I had frequent conversations with Arthur G. Willard in regard to underreamers and talked over the O'Donnell and Willard reamer with him. I don't believe he made any mention of any particular faults of the O'Donnell and Willard underreamer. I don't

(Testimony of E. C. Wilson.)

remember that he expressed opinion as to why the O'Donnell & Willard reamer had not been continuously used. If he made any statement or remarks that could convey any idea that there were any faults in this underreamer I don't remember it. He did not give me any reason why more of them were not made. I think he has always held to the opinion that that underreamer would do the work. I don't remember that he then expressed the opinion that that underreamer would do the work. I don't remember when he ever so expressed himself to me. I knew in 1903 that they were not doing anything with the O'Donnell & Willard underreamer. I knew that they were not manufacturing them generally,—not making a regular business of manufacturing and selling them. I knew that they were not making them in the shop. Arthur G. Willard and I discussed underreamers a great many times before we went to Bakersfield and exchanged ideas upon them. At that time he was working on an underreamer which had a movable wedge which acted vertically and was [159] spring-actuated and by which movable wedge the cutters were expanded in the reaming position. There was one of these underreamers under construction while I was at the Baker Iron Works. I was informed that it was tried. In a measure it was a success. After Mr. Willard and I went to Bakersfield I don't remember of ever discussing that underreamer. There was nothing of any importance attached to it. Neither he nor I have ever manufactured a reamer of that form since. I think a man by the name of



(Testimony of E. C. Wilson.)

Lehman was using this reamer or tried to use it. That was probably in 1903. That reamer never entered into Mr. Willard's and my plans of formation and exploitation of the business of the defendant.

Q. 483. Did Mr. A. G. Willard tell you how long this last so-called Willard & O'Donnell reamer was actually operated by Mr. Crumpton?

A. He did not.

Q. 484. Did he tell you what the results of such operation were?

A. He may have. At the time that reamer was made and was tried I was still in Bakersfield. I didn't come to Los Angeles very often and didn't get to see Mr. Willard very often. I really don't remember the particulars at all, if he ever told me, as to what result that reamer had given.

I am not positive that I saw Double reamers used prior to 1903.

Q. 495. When did you first see one run into the casing? A. Probably 1901 or '02.

Q. 496. Where?

A. Out in the West Side field. I think I saw some there—what we used to call the old West Side field in Los Angeles.

Q. 497. In the City of Los Angeles?

A. And I think also in Whittier and in Fullerton, probably in 1902 or '03.

Q. 498. You are sure it was not later than 1903?

A. Oh, I have seen them used since 1903; yes, sir.



(Testimony of E. C. Wilson.)

Q. 499. And prior to that time you had seen the Double reamers run into the casing, had you?

A. I think I had prior to 1903, yes, sir.

Q. 500. Are you not positive that you had seen the Double underreamer run into the casing prior to 1903?

A. Yes, sir; I think I have. I am not absolutely positive, but I suppose, from my recollection of my travels through the field, that it was probably 1902—as early as that, anyway.

It was a common complaint that the key device to which Double cutters were suspended was a weak device. I remember Allen Craig complained of it in 1903. He was drilling in Fullerton and complained that tools in use at that time were inadequate to the work really demanded. He even complained of the Rig Irons. Stated that the cutters were too weak to do the work in the required time. I remember Ben Scott of the Columbia Oil Company making the same statement. At that time I showed Allen Craig a drawing of an 8" Wilson reamer on which I was then working and he assured me that the reamer looked very promising to him and that he would give that reamer a trial the first opportunity he had. In his opinion the Wilson Reamer gave promise of being a stronger reamer than any of the reamers then used. I do not remember all the complaints they had to make in regard to underreamers, naturally I would not remember that long. The catalogues I referred to were in the office of the Baker Iron Works. They were the Oil Well Supply

(Testimony of E. C. Wilson.)

Company's catalogues. I did see the reamer being manufactured.

The cutters of the Wilson reamer when collapsed are held together by the U-shape device to hold the cutters collapsed together in order to run the reamer into the casing. This U-device is knocked off as the bits enter the casing. We have had complaints of the Wilson underreamer. We have had the ends of the prongs broken. We have had broken Wilson underreamer cutters and Wilson underreamer cutters lost in the hole. On rare occasions we [161] have had the dovetails on the side of the body broken out. I don't know that I ever saw a Wilson underreamer spread at the bottom. If cutters are not properly tempered they are liable to breakage, although they break very seldom through the tempered portion. Don't remember of ever having lost a whole Wilson reamer in the hole. Never heard of such.

The joint in the middle of the Double underreamer is similar to the joint used in the string of tools. Ordinarily in a string of tools in underreaming there are three or four taper pin and box joints. These joints are the same pin and box joint as used at the upper end of the Wilson reamer and at the top of the sub of the Double reamer, except that with the Double the joint is tubular. The shoulders of the bodies of Wilson underreamer cutters do not contact with the lower end of the dovetails. For the cutters to contact with the lower end of the dovetails endangers breaking the dovetails. From use I have



(Testimony of E. C. Wilson.)

known the shoulders of the cutters of the Wilson reamer to come in contact with the shoulders formed by the ends of the dovetails. It is one of the things we dread with a deadly hate. That is apt to commence trouble at once. As soon as those dovetail shoulders or retaining shoulders or rather the lower ends of same begin to take up any of the thrust of the cutter when in operation, an additional strain is at once given those same dovetail shoulders or retaining shoulders, which is very apt to cause said shoulders to be broken or torn loose from the body of the reamer. The Double underreamer cutters and V-shaped groove now made do not contact at the thrust bearing as formerly. In that thing Mr. Double copied me.

The first reamer we made, namely, the Wilson underreamer No. 1, which was made by the Baker Iron Works, of Los Angeles, did utilize that face or shoulder on the lower ends of the dovetail shoulders or retaining shoulders of the reamer body as a thrust-bearing, the shoulders of the cutters striking against [162] those faces or bearings when the reamer was in operation; but it gave us trouble by causing the dovetails or retaining shoulders to be torn off of the reamer body—at least that was our opinion—and we discontinued the use of that portion of the reamer body as a thrust-bearing.

Q. 583. And the only reason now for using these shoulders on the reamer body is that they are incidental to the cutting away of part of the metal to form the spreading portion of the mandrel of the de-



(Testimony of E. C. Wilson.)

sired width? Is that not true?

A. Yes, sir; they are merely an incidental feature of the construction of the Wilson underreamer, simply being the termination or the lower end of the dovetails or retaining shoulders of the reamer body.

I was repeatedly told by oil operators that the Double cutters did not have sufficient expansion. Allen Craig made that complaint. The "Complainants Exhibit Double underreamer" secures a greater expansion than defendant's underreamer. The "Double underreamer Complainant's Exhibit" was changed after the Wilson reamer came out, to give wider expansion and broader cutters. In 1904 there was an O'Donnell and Willard reamer on the platform of the Baker Iron Works. I probably first saw it in 1900 or 1901. I believe the reamer was for sale. While salesman for the Baker Iron Works I never made any attempt to sell that reamer that I remember of.

I was bookkeeper for the Baker Iron Works from 1897 until 1900 or 1901.

The hollow slotted extension as applied to the slotted portion of the partition between cutters of the O'Donnell & Willard reamer is an old term commonly used. It applies to a class of underreamers utilizing that construction. Such reamers as the Swan are so classified. I term the bottom of the Swan a Hollow Slotted Extension Type. It is hollow and it is also slotted. [163] The hollow and the slot are for the same purpose as in the Double underreamer.

(Testimony of E. C. Wilson.)

If the Wilson underreamer body was counter-bored or enlarged at the upper end it would be impossible to insert the spring. The assembling would be an entirely different method. There is no means provided for such counter-bar in the Wilson underreamer body. The expansion of the Wilson underreamer cutters is brought about by an entirely different set of means than those of the Double reamer. I can fancy such a position or situation which might arise by completely changing the form of construction of one reamer until it would finally look like the other one, and in that case the mode of operation would probably be the same. To change the suspension means, namely, the counter-bore to hold the spring, would not in any wise affect the expansion of the cutters.

If the metal in which is formed the hollow and the slot of the Double underreamer were withdrawn or dispensed with there would be no means of expanding the Double underreamer cutters. The larger portion of that metal is required, to expand and to keep the cutters expanded. I see no slot in the side of the Double underreamer body except that for the Key. That slot is about seven inches long. That stationary wall or partition serves two purposes. In fact, several purposes. Practically all of that hollow slotted extension comes in contact with the backs of the underreamer cutters while in use. The underreamer would not be operative if a portion of that hollow slotted extension were removed. No driller would use it in that condition. The retaining



(Testimony of E. C. Wilson.)

shoulders on the Wilson underreamers are preferably formed by using a milling tool. These shoulders are formed on the inner faces of the forked prongs of the Wilson underreamer. The retaining means on the Double underreamer are formed by planing grooves, a different operation. They are to prevent the cutters from swinging out beyond a certain limit. The Wilson underreamer [164] cutters cannot tilt in the sense that might be applied to the Double underreamer cutters. There being no stock or material interposed between the cutters there is nothing on which they can tilt. They swing or collapse together by a pendulum-like action. The cutters are attached to the tee by means of pockets or recesses in the backs of the cutter shanks. They are somewhat larger than the tee. The cutters do not tilt on that rod, they simply swing on the tee rod. If these pockets or recesses were the same size as the tee it would be impossible for the cutters to collapse. The action with the Wilson cutters is different from that of the Double in that the Wilson cutters do not slide back or forth on the tee or key as they contract or collapse. That is an old form of suspending cutters used long before the Double or Wilson underreamers were adopted. In the old style Wilson there is a pipe over the mandrel and underneath the spring. There is no such pipe on the "Wilson Complainants' Exhibit Wilson underreamer No. 2." The stop was produced by the slot in the tee. We changed to the new style of slotted tee about a year ago, probably the middle of the year 1911. There is approximately



(Testimony of E. C. Wilson.)

450 to 500 reamers like "Complainants' Exhibit Wilson Type," maybe 550.

The O'Donnell & Willard reamer was, according to our records, shipped to Coalinga October 17, 1908. "Defendants' Exhibit Double underreamer" is probably a 4½" reamer. "Complainants' Exhibit Double underreamer" is probably the same size. The new style Double is probably ¼ of an inch wider in cutters. The cutters of the old style Double have been dressed out.

A. 720. Plunging is an action caused by the underreamer cutters wedging or sticking in the hole which is being reamed, and when the upward stroke of the beam takes place a high tension is put on the drilling line and if the reamer suddenly releases or is suddenly freed from the hole the elasticity of the line throws the tools into the air up in the hole a greater distance than the length [165] or stroke of the tools in operation. The next down stroke of the walking-beam begins before the tools themselves start to return on the downward stroke. They thus have a considerably greater velocity on the down stroke than would be given by the swing of the beam and consequently strike into the hole or shell with added force. This causes them in numerous instances to wedge again in the shell, and the operation is repeated.

Q. 721. This same throwing of the bit or tools into the air further than the stroke of the walking-beam is encountered in well drilling when drilling the hole with the ordinary bit, is it not? A. Yes, sir.

(Testimony of E. C. Wilson.)

Q. 722. And the result is the striking of a heavier blow than you would otherwise strike if there were no jump? Is not that true?

A. Yes, sir; that is correct.

Q. 723. Now, do you mean to tell me that there is no plunging in the hole with the Wilson reamer?

A. I have been assured by many practical drillers that the Wilson reamer does not give the trouble from plunging that the Double reamer does.

On extremely small size Wilson underreamers we sometimes flatten the safety bolts to permit the cutters to collapse more completely. The first time that was done was possibly in 1904 or 1905.

I was informed by Edward North one evening that he was designing an improved underreamer, the cutters of which were so arranged or the body was so shaped as to lock the cutters securely, wedging them apart while the reamer was in operation. At that time I was familiar with the difficulty of the original North reamer. I afterwards learned that these reamers were being manufactured by the Union Tool Company. I afterwards learned that the reamers had been tried out but had not been as satisfactory as other reamers then in use. I have not seen either type of North reamer in use in recent years. [166]

At the time I called on Mr. Lyon in regard to obtaining patent on my reamer I received no information as to the Double Reamer. At that time I had seen Double underreamers such as "Defendants' Exhibit" but had never seen one like "Double reamer Complainants' Exhibit." At that time the Wilson



(Testimony of E. C. Wilson.)

underreamer was still in process of experimentation and development.

Q. 749. (By Mr. BLAKESLEE.) Please state in a general way the extent of consideration given by you to improvements in underreamers subsequent to that time and prior to the time you applied for the patent "Defendant's Exhibit Wilson Patent."

Mr. LYON.—Object to that, as irrelevant and immaterial; not redirect examination.

A. My observations up to that time convinced me that there was a very strong probability of my being able to develop an underreamer which would meet the demands, and I was not altogether satisfied with the reamer which is in accordance with the design of the wooden model as shown to Mr. Lyon, and I continued to give the matter pretty careful thought and finally devised changes which to my mind not only strengthened the cutters but gave them even greater expansion, and those ideas in the aggregate were finally crystallized into the one design which later was known as the Wilson underreamer. At that time I was a client of Townsend Brothers, Patent attorneys.

The tee used in the slotted tee type of Wilson underreamer comes in contact with the Wilson cutters.

The second Wilson underreamer was made by the Bakersfield Iron Works during the year of 1904. The third Wilson underreamer was provided with quite a space between the upper edges of the shoulders on the underreamer cutters and the lower



(Testimony of E. C. Wilson.)

end of the dovetails on the reamer body. That has been our practice ever since.

While in the offices of the Baker Iron Works I had frequent occasion to go to the different oil well supply houses and also into the oil fields. I occasionally inspected oil well tools in use in [167] the oil fields. The subject of underreamers was frequently discussed. Much of my time was spent in the shop of the Baker Iron Works. Believe I have not inspected a Double underreamer, never had one taken apart.

The joints in a string of tools are considered hazardous. When the "Double Underreamer Defendants' Exhibit" is in operation there is no point of the body interposed between the cutters below the dovetails. I refer to "Double underreamers Defendant's Exhibit." That is not the case with the "Complainants' Exhibit Double Underreamer." That reamer has a lug or projection interposed between the cutters and extending below the dovetails. The dovetail ways in the Wilson reamer are parallel while those of "Double Underreamer Complainants' Exhibit" or "Defendant's Exhibit" are upwardly and inwardly inclined.

Q. 772. Please state with respect to "Complainants' Exhibit Wilson Underreamer," and also with respect to "Complainants' Exhibit Double Underreamer," the operative relation between the pairs of dovetails or shoulders in each of such exhibits and the co-acting surfaces of the cutters in those exhibits during the play or movement of the cutters between

(Testimony of E. C. Wilson.)

extended and contracted positions.

A. The cutters of the Double underreamers, complainants' exhibit, being held in place by inwardly and upwardly inclined retaining shoulders on the reamer body, have a tendency to tilt or teeter on the hollow slotted extension or spreading-bearing on their downward travel preparatory to collapsing the cutters. This, for the reason that the pressure of the casing-shoe against the cutters themselves have a tendency to collapse the cutters and apply a strain to that end from the moment the cutters come in contact with the shoe when withdrawing the reamer into the casing. This causes the upper ends of the cutters to tend to tilt outwardly and the lower ends of the cutters to tilt inwardly. No; I am wrong. No; that is right. The lower end of the cutters tilt inwardly and the upper ends tilt outwardly. And this continues until [168] the cutters are drawn down far enough for them to drop in together as the inwardly projecting shoulders at the backs of the cutters slip off over the spreading-end of the hollow slotted extension. This operation differs from that of the Wilson underreamer, in that the dovetails or retaining shoulders of the Wilson underreamer body, being parallel to each other, and also parallel to the reamer body, does not give the cutters an opportunity to tilt outward at the upper ends; nor is it necessary for the cutters to tilt outwardly at the upper ends, as they are being collapsed, for the reason that there is no material interposed between the shanks of the cutters to prevent them from col-



(Testimony of E. C. Wilson.)

lapsing or swinging toward each other, as is the case with the Double underreamer. Consequently, the cutters of the Wilson underreamer simply swing on the T-bar, allowing the lower ends to swing toward each other as the reamer is collapsed. Such cannot be done with the cutters of the Double underreamer, as there is no opportunity for them to swing toward each other so long as there is solid steel interposed between the shanks of the two cutters, without the allowance made for same, and that allowance could only be made by removing that hollow slotted extension from between the cutters. There being no possibility of the Double underreamer cutters swinging together, an allowance must be made in order to permit them to tilt, by allowing the upper ends of the shanks to tilt outwardly to permit collapsing. Hence, the tapering dovetails or retaining shoulders, which is not needed on the Wilson underreamer body. In brief, the Double underreamer cutters literally tilt over the spreading-bearing as they are being drawn down into collapsing position, while the cutters of the Wilson underreamer do not tilt, as the upper ends remain in the same relation to each other and the lower ends only of the cutters change relation to each other by swinging toward each other as the cutters collapse.

Q. 773. Please state whether I am to understand, in the collapsing [169] movement of the cutters in "Complainants' Exhibit Double underreamer," there is a relative movement between parts of the cutters at the upper end, or whether there is a rela-



(Testimony of E. C. Wilson.)

tive movement between the upper ends of the cutters in entirety.

Mr. LYON.—Objected to as leading.

A. The entire upper ends of the shanks of the Double underreamer cutters tilt outwardly for a certain period of time in which the cutters are being collapsed.

Q. 774. (By Mr. BLAKESLEE.) Please specify in a similar respect with relation to the upper ends of the cutters in “Complainants’ Exhibit Wilson Underreamer.”

A. Only that portion of the upper ends of the shanks of the cutters of the Wilson underreamer which are above the T-head has a tendency to tilt outwardly as the cutters collapse, as the pivotal point is at the point of suspension of the cutter on the T-head.

Q. 775. In either of these underreamers, is there a slight movement of the cutter upon the key or upon the T-head, as the case may be?

Mr. LYON.—Objected to as leading.

A. In case of the Double underreamer, the cutters are obliged to slide outwardly on the key as they are withdrawn into collapsing position, for the reason that the shanks of the cutters are tilting away from each other and outwardly as the cutters are being collapsed; but in the case of the Wilson underreamer, they do not slide on the T-head, as the pivotal point is directly at the point of suspension on the T-head itself.

Q. 776. (By Mr. BLAKESLEE.) Please com-

(Testimony of E. C. Wilson.)

pare the collapsing action of the cutters in each of these underreamers with respect to the responsiveness and opposition to the stresses applied to same in the collapsing action.

A. I will explain that I have discovered that there is a slight tendency for the Double underreamers to commence collapsing [170] on their initial downward stroke, and this is brought about by the tapering bearings of the dovetail shoulders or retaining shoulders of the reamer body. The collapsing is due to the tilting action of the cutter on its spreading-bearing; but the action is produced in a different manner with the Wilson underreamer. The Wilson underreamer does not rock on the spreading-bearing. The cutting edges of the cutters swing inwardly, as they tend to follow the tapered spreading-bearings at the lower extension of the reamer body.

Q. 777. Please go further and compare these two collapsing actions with respect to responsiveness to the pressures applied in causing the collapsing.

A. In the case of the Wilson underreamer, the points of expansion are interposed well down toward the lower or cutting ends of the reamer cutters. There is no material in the reamer body which comes in contact with the backs of the shanks of the cutters and consequently there is not the chance for these cutters to bind or cramp when the strains applied by the shoe are collapsing the cutters as the reamer is being withdrawn into the casing that does occur on the Double underreamer. The retaining shoulders of the Double underreamer are formed in a



(Testimony of E. C. Wilson.)

different manner from those of the Wilson, namely, they are formed by planing or machining grooves in the sides of the pockets or sockets formed to receive the shanks of the cutters. As the dovetails or shoulders on the shanks of the cutters work vertically in these grooves, it will be plain that there is a pressure applied at both front and back of the retaining shoulders or dovetail shoulders on the shanks of the cutters and which causes more or less of a bind or cramping as the collapsing force of the shoe is applied to the cutters when withdrawing the cutters into collapsing position; consequently the Wilson underreamer cutters collapse more freely and the reamer withdraws into the shoe with less strain and with less binding than is the case with the Double underreamer. [171]

Recalled—Redirect examination resumed.

(By Mr. BLAKESLEE.)

Q. 778. In the Swan underreamer, to which you have referred in your cross-examination, I believe you have testified there was present a hollow slotted extension. Will you please compare that hollow slotted extension with what you have referred to as the hollow slotted extension in "Complainants' Exhibit Double Underreamer," and "Defendant's Exhibit Double Underreamer?"

A. The hollow slotted extension of the Swan underreamer had a hole drilled in it, centrally located, and extending lengthwise with the extension, and said hole was drilled to admit of the spring-actuated rod or mandrel. It had a slot extending through the



(Testimony of E. C. Wilson.)

extension from one side to the opposite side of the extension, and the slot also extended through the hole drilled in the extension. Mechanically speaking, it was hollow by reason of the hole being drilled in it lengthwise, and was slotted by reason of the slot projecting through from one side to the other of the extension. The extension as a whole refers to that portion of the underreamer body which extends downwardly and beginning with the abutments or shoulders against which the cutters thrust when reamer is in operation and when cutters are expanded or in reaming position. It had dovetails or retaining shoulders at each side of the extension, which shoulders were formed by machining grooves into the sides of the reamer body parallel to the faces of the extension. These grooves formed ways for the retaining shoulders or dovetail shoulders on the cutters, and by means of those grooves the cutters were held in place. The hollow slotted extension formed the means of expanding the cutters to reaming position and holding them to reaming position, but it did not have means provided at the lower end in the way of tapering faces for expanding the cutters into position, as the cutters of the Swan underreamer contracted or expanded by traveling vertically on the inclined faces of the hollow [172] slotted extension, the said faces projecting downwardly and inwardly. The hollow slotted extensions of the Double underreamer, in both the exhibits of the complainants and the exhibit of the defendant have precisely the same form of hole drilled lengthwise with the

(Testimony of E. C. Wilson.)

extension centrally located therein, has the same form of construction of slot and similarly located, the retaining shoulders or dovetails on the body are formed in the same manner, namely, by planing or machining grooves to admit of the retaining shoulders on the cutters; but the difference or differences between the hollow slotted extensions of the Swan reamer and the Double reamer is that the opposite faces of the hollow slotted extension of the Double are parallel and vertical, and also have a wedge-like face or termination of the lower end of the hollow slotted extension formed by downwardly and inwardly projecting faces, over which faces the cutters slide when being collapsed or expanded.

Q. 779. Please compare and contrast the features of "Complainants' Exhibit Willard & O'Donnell Reamer" with the features which cause the spreading of the cutters in the Swan reamer.

A. As before explained, the spreading features of the Swan are simply a wedge-shaped partition or hollow slotted extension interposed between the two cutters. The body is provided with retaining shoulders or dovetail shoulders by which the cutters are held in place, and the cutters are collapsed by drawing them downward, which compresses the spring, and as they follow the downwardly and inwardly inclined faces of the hollow slotted extension, the cutters are brought closer together, or, in other words, collapsed. They are expanded by the opposite action of the spring, drawing the cutters upwardly and outwardly. The expanding means of the O'Donnell &



(Testimony of E. C. Wilson.)

Willard underreamer consisted of a similar hollow slotted extension or stationary wall or partition, with the cutters slidably mounted, and as the cutters were drawn downwardly, upon reaching a certain point they tilted over the extreme lower end of the hollow slotted extension or stationary wall or partition [173] interposed between the cutters, the lower ends tilting inwardly and the upper ends of the cutters tilting outwardly and sliding upon the key or suspension means. They were expanded in position by the opposite action of the spring, which withdraws the cutters upwardly, causing the cutters to again tilt outwardly over the spreading-bearing of the slotted extension, the upper ends of the cutters tilting inwardly at the same time, and the cutters were drawn upwardly until they rested against the thrust-bearings and expanded to reaming position. The main difference was that the cutters of the Swan underreamer had no tilting action; those of the O'Donnell & Willard tilted over the spreading-bearings interposed between the cutters.

(By Mr. BLAKESLEE.)

Q. 782. Supposing the slotted extension in each of these Double exhibits and types of reamers were eliminated, please state what the effect would be with respect to the action of the cutters and the slotted rod and the key suspending the cutters.

A. If the portion of the hollow slotted extension of Double underreamer defendant's exhibit—that portion of the hollow slotted extension which is in-



(Testimony of E. C. Wilson.)

terposed between the backs of the cutters—was removed entirely, the underreamer would be rendered entirely inoperative. There would be nothing left between the cutters over which they could tilt or by which they would be expanded into reaming position, nor would there be any material interposed between the cutters which would keep the cutters expended to reaming position. Consequently they would simply hang together upon the key and the vertical travel of the cutters up or down would neither expand nor contract them; consequently it would be utterly impossible to do any reaming whatever with the tool; the reamer would simply swing up and down in the hole, with no possibility of the cutters swinging out or being held out into reaming position. In the case of “Complainants’ Exhibit Double Underreamer,” [174] the result would be different. This reamer has been so changed that if that portion of the hollow slotted extension which forms the wall or partition between the backs of the cutters were removed, namely, the same stock correspondingly as could be removed from the old style Double underreamer as shown by defendant’s exhibit, the reamer might be worked with some degree of success. The changes have been so pronounced that the operation referred to would still leave spreading-bearings interposed between the cutters, which spreading-bearings would be immediately below the dovetail shoulders or retaining shoulders of the reamer body. The cutters of the improved Double underreamer, as shown by the complainants’

(Testimony of E. C. Wilson.)

exhibit, have also been changed by both broadening the body of the cutter and narrowing the shanks of the cutter in such a way as to leave the shoulders projecting at right angles to the shanks, which shoulders would ride upon that portion of the spreading-bearings of the improved Double underreamer which would remain after removing the material from the hollow slotted extension which is interposed between the shanks of the cutters. However, this reamer would probably prove to be very dangerous, as the only means of keeping the cutters spread apart at the upper ends when the reamer would be in operation would be simply the light rod, with slot and key, by which the cutters are suspended.

Q. 783. What would be the working relation, under the conditions last specified, between the cutters and the slotted springs around its stem or rod?

A. The rod would be the only bearing against which the cutters could strike at the upper ends when tilting inwardly while in reaming operation, and the rod would have to serve as the spreading-means between the cutters at the upper end.

The dovetails or retaining means on the shoulders on the Wilson underreamer body are much heavier and consequently much stronger than those of the Double underreamers of the same size. [175]

My source of information in regard to the explosion at the Red Top Hill Oil Company when endeavoring to blow or shoot a piece of broken Double underreamer out of the way was from the papers. That



(Testimony of E. C. Wilson.)

article was published in the "Echo" and the "Daily Californian," both of Bakersfield. It also appeared in the Coalinga paper. [176]

**Testimony of John A. Kibele, for Defendant.**

JOHN A. KIBELE deposes and testifies as follows:

My name is J. A. Kibele; age, 37; residence, Bakersfield, California; occupation, drilling wells. Have drilled oil wells for about eighteen years. Have operated in Ohio, Indiana and California. Have been in California about twelve years. I have used underreamers extensively. I have used Austrian, Double and Wilson underreamers. I used the first Austrian reamer in 1900. In Santa Barbara County. We did not make so very much of a success with it. We had no calf wheels in the derrick and we tried to underreamer before we raised the pipe, that of course made it difficult to start the reamer. I had seen Austrian underreamers before that time and had seen them in different supply houses.

My first knowledge of the calf wheel was about the year 1900. That was in the Kern River Field. The calf wheel is absolutely necessary in order to use an underreamer.

Q. 21. Please state how this concerned the operation of underreaming.

A. Well, if you didn't have the calf wheel in a derrick, you would either have to take your lines off of the bull wheel and set your tools back to raise and lower your pipe, and it is necessary to have the pipe



(Testimony of John A. Kibele.)

up some distance off of the bottom to start an underreamer or some distance off of the bottom to start an underreamer or some distance away from the shoulder.

Q. 22. What effect did the introduction of the calf wheel for handling the casing have upon the operation and practice of underreaming?

A. Well, if you didn't have the calf wheel in the derrick, you might as well throw the underreamers away, or else make yourself twice as much work.

Q. 23. Please recite your experience in the use of calf wheel with an underreamer, at the same time that an underreamer was used. [177]

A. I don't quite understand your question.

Q. 24. Please tell us about the first experience you had in underreaming when a calf wheel was used to support the casing.

A. Well, you first must raise the casing from the bottom of your shoulders to start an underreamer.

Q. 25. Let me interrupt to call your attention to the fact that I wish you to state what your first experience was of this sort, that is, what your first personal experience was of this sort.

A. With the use of an underreamer and the calf wheel?

Q. 26. Exactly.

A. Well, of course my experience since with the calf wheels and the underreamers has been successful, that is, I have got along all right, and if it was not for the calf wheels, I could not hardly see how

(Testimony of John A. Kibele.)

you could use an underreamer, that is, in success, because the casing must be from the bottom of the hole to start a reamer. You could not start a reamer, you might say, with the casing standing on a shoulder if the formation was hard enough to hold up the weight of the reamer. That is as near as I could state it.

Q. 27. When was your first experience of this sort?

A. Well, that was along about 1901 or 1902. Some time like that. About 1902, I think. It might have been a little later than that.

I used Double underreamers in about 1902. I used style like Defendant's Exhibit Double underreamer. We used it with a calf wheel. Never saw a Double underreamer used without a calf wheel.

I first used the Wilson underreamer in about 1907. Of the style Wilson underreamer Complainant's Exhibit Wilson Underreamer.

I have used both styles of Double underreamer. The first underreamer, Complainant's Exhibit Underreamer, was about three [178] and one-half years ago.

I prefer the Wilson underreamer. The Wilson underreamer goes down the casing better and it pulls into the casing easier and is stronger in general. It gives you more for your money. It can be re-machined and used three different times. After the Wilson Reamer has been re-machined it is just the same in operation as before. I have various sizes of Wilson reamers on hand now which I use myself and which I rent. At the present time I think there



(Testimony of John A. Kibele.)

are more Wilson reamers used in the Kern River Field than the Double. In other fields I think they are in use in about equal number. That has been since the last three or four years. I have observed more broken Double underreamer cutters. The Double reamer cutter breaks through the hole where the key is placed. I suppose I have seen three Double underreamer cutters where I have seen one Wilson.

The old style Double underreamers give us trouble in getting into the holes. We had to tie the cutters together. The new style Double reamer, being a brand new reamer did not give me trouble at that time. I have never found it necessary to tie Wilson cutters together to get them down into the hole. The only breakage to Wilson underreamers that I have ever had was broken cutters. Have seen Double underreamers broken at the bottom. I have seen about a carload of broken Double underreamers in Coalinga. I have known of Double underreamers giving trouble at the middle joint. Same occurred on the Peerless Oil Company's property in the Kern River Field. The reamer came unscrewed at that joint. They fished the broken part out. The Wilson cutters have more cutting surface than the Double cutters. This is an advantage as it gives more cutting surface and you can ream the hole in a little less time. I have known of "key-waying" the hole being done with both styles of reamers. [179]

I have used Wilson reamers without the retaining bolt or safety bolt. It made no difference whatever. If there is enough room in the hole for the cutters



(Testimony of John A. Kibele.)

to swing across from one side to the other with the safety bolt out there is no occasion for running an underreamer as the hole is large enough without reaming. I cannot figure out how a man could pull the cutters to one side while the reamer is down in the hole. The wider cutters of the Double reamer were first used about four and one-half years ago. It was between 1908 or 1909 I first saw Double underreamers having the wide shoulders.

The middle joint in the Double underreamer creates the risk of running one more joint in the hole. Each joint used on a string of tools increases the risk.

Q. 119. Please compare and contrast this joint between the mandrel and the sub of the Double underreamer with the joints that are used in other parts of the string of tools used in reaming.

A. Well, I would compare the joint on the Double reamer like a joint that is used for rotary drilling, a hollow joint; and the other is a tool joint that is used on the drilling tools.

Q. 121. In the use of the Wilson underreamer, have you ever had it "ball up" between the cutters?

A. No, sir; I have not.

Q. 122. How about your use of the Double underreamer in this respect?

A. No, sir; I have not.

Q. 123. Assuming that you were reaming in a formation where such balling up was likely to occur, please specify which of these types of underreamers you would prefer to use.

(Testimony of John A. Kibele.)

A. Well, I would prefer the Wilson reamer.

[180]

Q. 124. And for what reason?

A. Well, because I have never, in my experience in using the reamer, had any occasion to change the wrist-pin on the crank, to shorten the stroke of the lick. I have always felt confident that the reamer was equal to any work that it was intended for.

Q. 125. How as to the use of the Double under-reamer and the position of the wrist-pin?

A. Well, if I was compelled to run the old reamer in hard formation, I don't know as I would run it as hard as I would the Wilson reamer.

Q. 126. In other words, you would move the wrist-pin so as to get a shorter stroke?

Mr. LYON.—Objected to as leading.

A. If I was given one of the old reamers to run and it was left to my judgment, I would set the pin back to where I thought it was proper.

Q. 127. (By Mr. BLAKESLEE.) What do you mean by setting the pin back?

A. Well, to avoid breaking the reamer in the hole.

The underreamer is the quickest and easiest way of disposing of pieces of broken casing in the hole. I have used Wilson underreamers with very good results on such jobs. We got by the casing. The Wilson reamer worked first class on that kind of work. Never had any trouble with it. Never knew of any instance where Wilson reamers or Double reamers ever had caused trouble by material being jammed in between the cutters.



(Testimony of John A. Kibele.)

The Traders Oil Company of Coalinga lost a Double underreamer in the hole and had to move the rig. That is, they had to start a new hole. A reamer was left in the hole by another company the same way at about the same time. That was a Double [181] reamer. On the Angeles property the Double reamer broke in two at the square portion of the middle joint. The lower half of that reamer was never fished out.

Another instance, on the Lucile property in Coalinga the Double underreamer cutter broke and they could not get the reamer out without first pulling twenty-two hundred (2200) feet of eight-inch casing. They used a Wilson underreamer after that. I have probably seen a big wagonload of the lower halves of Double underreamer bodies in junk heaps or scrap heaps of the Coalinga fields. The old bodies were what we termed "jimmed up." By that I mean broken or battered and worn out. There were also broken cutters of Double underreamers there.

Q. 191. What did you observe there as to any of these reamers? What did you see there?

A. At this old junk pile?

Q. 192. Yes.

A. Well, some were broken out and some were doubled back, and in all sorts of conditions. The reason I went there was I was going to buy a string of underreamers; and in the first place I went there to rent them and the man in charge told me that they had gone out of the rental business, and he told me— We went out to see if there was one of the



(Testimony of John A. Kibele.)

reamers in condition to run, and there was not. So, after looking over this bunch of reamers, I concluded that I would buy the Wilson reamer. That was the best evidence that I could get in the difference of the two reamers. And then when I was through with my own personal work, I put my reamers on the market for rental, and I took their rental list price; I copied that from the Oil Well Supply at Coalinga.

The broken Double cutters were broken where the key goes through the cutter. [182]

The Wilson underreamer has more expansion, cuts a larger hole than the Double reamer.

#### Cross-examination.

The calf wheel is used in an oil-well rig to lower and raise the casing. In order to underream the casing is raised on the calf wheel and then is held in suspension by spider or casing spider which has been clamped. If you did not have the calf wheel it would be necessary to handle the casing with a bull wheel, but you would have to take the drilling cable off and string up the line which handles the casing and this would take a great deal of time and also you would probably not have enough power with the bull wheels to handle the casing.

Q. 204. And you can raise the casing with the bull wheels, can you not?

A. You can, but it would be impracticable, for the reason that there is times you have to raise and move your casing every thirty minutes, and sometimes in less time than that.

(Testimony of John A. Kibele.)

Q. 205. In underreaming?

A. In underreaming, or in carrying a string of casing.

If you don't have a calf wheel in the derrick I don't think it would be possible to underream. The underreamer would not be of use to you. If you dispense with one you might as well dispense with both.

When drilling an oil well in Indiana we used Standard Rigs but did not have calf wheels. We handled the drilling tools with the bull wheels. The casing was put in with a single line with the end of the bull wheel.

Underreamer cutters are generally dressed by the tool dressers or helpers in the rig. I prefer to run an underreamer on the long stroke as they cut the hole better. The reamer is not so apt to mud up.  
[183]

I mean by fishing when endeavoring to recover a lost tool in the hole.

There are instances where men get careless with joints and even drilling bits are lost in the hole. Breakage of drilling tools in drilling oil wells is not altogether a frequent occurrence. Breakages are not altogether due to carelessness of the men. Sometimes the tools break at the well, which is no fault of the driller. Of course where the joint occurs there is a risk. In regard to the expansion of the Wilson cutters will say that I remember Sam Lamb while working on the St. Francis oil property in Coalinga had difficulty in carrying special four and



(Testimony of John A. Kibele.)

half inch ( $4\frac{1}{2}$ " ) casing. He was using Double reamers. I persuaded him to try Wilson reamers and the Wilson reamer did the work without any more trouble, making the right sized hole.

The first Double reamer I ever saw was in the year 1906. I have been associated with a company for about seven years who use Double reamers. In 1901 I was drilling in Schuman Cañon. That was where I used the Austrian underreamer. In parts of the Kern River fields there is considerable underreaming to be done. In 1901, 2, 3 and 4 I cannot say that I saw any Double underreamers in the field, although I was in the Kern River field, Santa Barbara county fields and the Santa Maria fields. I can't say that I did not see them, I don't remember. As a matter of fact, I do not know whether Double reamers were used in 1902, 3 and 4 or not.

At the time I first saw the Wilson underreamer the Double underreamer was in general use. I cannot tell how many Wilson or Double reamers have been in use at any one time in the Midway fields. I know this however, that in one rig you may find Wilson reamers and in the next rig you will find Double reamers. Sometimes you will find Wilson and Double reamers in the same derrick. For the deeper hole and the smaller holes the Wilson [184] reamer seems to be the one preferred.

I have sold a good many Wilson underreamers. It has been about four years since I sold Wilson underreamers. I have recommended Wilson underreamers ever since. My reason for abandoning sell-



(Testimony of John A. Kibele.)

ing Wilson underreamers was that I sold so many of them that the shop (Bakersfield Iron Works) was put on a night and day basis and they couldn't fill the orders that I got. Wilson will verify that statement. I don't know how many I sold—probably more than a hundred. I think a Wilson underreamer will outlast three Double reamers. I believe at the time I was selling Wilson reamers I sold more in the Coalinga field than there were Double reamers sold. California drilling necessitates moving the casing while drilling operation is in progress. This to keep the casing from freezing, and also while underreaming. Hence the necessity for the calf wheel. The first time I ever saw calf wheels in use in California was about 1901.

Q. 344. What would you say was the proportion of Wilson and Double underreamers in use in California at the present time?

A. About probably three to one, I suppose, take it as a general thing through.

Q. 345. (By Mr. BLAKESLEE.) You had better state in favor of which.

A. Well, I presume that there is maybe three Double reamers sold to the Wilson's one.

Q. 346. (By Mr. LYON.) That is as nearly as you can estimate it?

A. That is as nearly as I can estimate it.

Q. 347. And that is based upon your observation of the fields?

A. Well, I think so. That is probably the record. But as for the difference of the tools in use, I sup-

(Testimony of John A. Kibele.)

pose it is about [185] equal, that is, in the drilling operations. I think the Wilson reamer will outlast three Double reamers.

Q. 348. That is due to the re-machining that you speak of? A. Yes.

Q. 349. And that re-machining is practically making a new reamer out of the reamer after it has been worn out in its original condition? A. Yes, sir.

I have been going through the oil fields every two or three weeks.

A. 390. Well, yes, sir. In order to underream a hole successfully, you have to naturally have a free string of casing; you must raise your pipe and give yourself clearance for the underreamer to start; and when you underream the hole down to the point you have drilled, you can lower the casing as near to where to keep the sand from bothering you to keep you from going on ahead, but you have to move the casing as the reaming progresses. Well, while you are making twenty feet of hole, you are probably moving the casing four or five times, and probably while you are underreaming you can probably underream maybe two screws without pulling out and you move the casing maybe once while you are underreaming twenty feet.

Q. 392. With respect to the general operation of making a hole in the California fields, what do you consider has been of the most benefit to such operation during the last twelve years?

A. Well, with the aid of the calf wheels and the underreamers.



(Testimony of John A. Kibele.)

A. 399. We had a calf wheel on the rig at Schuman Canyon. I put that in, in a kind of makeshift way, myself.

Q. 400. How long did you have the calf wheels in the Schuman Canyon, then?

A. Well, it was after the hole was down about eight or ten [186] hundred feet. We didn't use them very much then, because we didn't hardly know enough about it then.

**Testimony of E. Clement Wilson, for Defendant  
(Recalled).**

E. CLEMENT WILSON — Recross-examination  
Continued.

The first Wilson underreamer, namely, Wilson Reamer No. 1, was first used by the California Oil-fields Limited of Coalinga. It was then used in McKittrick by the Associated Oil Company. It then went to the Salt Lake Oil Company of Los Angeles.

Q. 805. The dovetail ways and slips of this Swan underreamer provide a mode of collapsion and expansion which is controlled and dependent upon the inter-engaging dovetails forming a track or guide for the bits, and causing the bits to move by sliding in straight lines upon the lower end of the body or mandrel of the underreamer. Is that not correct?

A. Yes, sir; the cutters travel in straight lines at diverging angles from each other.

Q. 806. In other words, the bits of this Swan underreamer or of the device as shown in the said Swan patent, do not in any manner tilt freely upon



(Testimony of E. Clement Wilson.)

the head of a spring-actuated rod, do they?

A. They do not.

Q. 807. Would you say that that is the same mode of operation as the mode of operation utilized in the expansion of the bits in the Double underreamer?

A. Not altogether. The mode of expansion in the Double underreamer is a combination of the mode used by the Leidecker Tool Company's reamer, commonly known as the Swan reamer, and the tilting action of the cutters on this spreading-bearing as exemplified by other reamers.

Q. 808. What reamers?

A. The O'Donnell & Willard underreamer and the underreamer shown by Brown's patent No. 867,296, the underreamer shown by figure 2161 in the Oil Well Supply Company's catalog under date of the [187] year 1900, and also by the underreamer shown in Day's patent, the number of which is 403,877.

### **Testimony of W. W. Wilson, for Defendant.**

W. W. WILSON deposes and testifies as follows:

My name is William W. Wilson. Age, 31 years. I reside in Los Angeles. Occupation, designing and selling oil well tools. I have been in this line of work about eleven years. I was employed by the Bakersfield Iron Works as draftsman, also outside draftsman for outside parties in 1903 to 1908. Graduated from Stanford University, engineering department. Have been employed by the Columbia

(Testimony of W. W. Wilson.)

Oil Company of Bakersfield and was connected with the Wilson and Willard Manufacturing Company since 1908, with the exception of eight months in 1910 when I was connected with the Bunting Iron Works of Coalinga. Have previously acted and testified as expert in patent litigation cases.

Q. 12. Please summarize, briefly, the disclosure of the drawing and specification of said patent.

A. We have disclosed in this patent an oil-well tool known as an underreamer, which is intended to be run in a hole which has been previously drilled to a considerable distance beyond the end of the casing by means of a bit, and which hole is intended to be enlarged sufficiently to allow the pipe to follow down the hole. In many formations the weight of the casing on the casing-shoe or sharpened collar on the bottom of the casing is sufficient to cut the sides of the hole out large enough to allow the casing to follow. In other formations it is necessary, due to their hardness, to use a tool which will run down inside the casing and have means which will expand sufficiently to ream the hole out to a diameter larger than the outside diameter of the collars on the pipe to allow the casing to be lowered further in the hole. Such [188] a tool is called an underreamer. This reamer disclosed in patent 734,833 consists of a body in which there are two pieces joined together by threaded parts in which there is a spring seated at its lower end on a shoulder in the body. The upper end bears against a nut or retaining means of a mandrel or rod. The lower end of this rod has a



(Testimony of W. W. Wilson.)

slot through which is inserted a key, which key is long enough to extend within pockets cut on the insides of the cutter-faces. On the lower end of the body are pockets cut in the sides, into which the cutters or expanding-means are placed. The cutters are arranged to have movement so as to be drawn down over the ends of the body, and means are arranged permitting the cutters to close together when in this position. When released the cutters are drawn up by the pressure of the spring acting on the rod, which in turn acts on the key, which acts on the cutters, drawing them up on the body over spreading-bearings on the lower end of the body, causing them to expand to a sufficient diameter that they may be used to bore or ream the hole out to the enlarged diameter. The lower end of the body, which extends beyond the upper end of the cutters when in expanded position, is shown in section figure VII, consists of a substantially H-shaped section. This section has a whole drilled vertically through it into the rod or mandrel place. It also has a slot cut crosswise, through which the key which supports the cutters passes. This slot is made sufficiently long to allow necessary travel of the key, to allow the cutters to be withdrawn or to be drawn into acting position. On the inside of the cutters are placed one shoulder on each cutter, shown in figure XII by face 18. These faces are arranged to bear against the lower portion of the extension shown in figure IX at 6, when the cutters are in working position, and are the means whereby



(Testimony of W. W. Wilson.)

these cutters are held in expanded position. In order to operate the reamer, the screw eye, 28, is screwed into the lower end of the mandrel rod, and means are used on this screw-eye to draw the rod down, compressing the spring, drawing the cutters down so they may [189] be collapsed. The reamer is then placed in the pipe and run down to the lower end of the casing, the cutters being held in contracted position by the pressure of the pipe on the outsides of the cutters, holding the face 26 on the cutters in contact with the lower face 25 of the extension. As soon as the reamer moves beyond the casing-shoe or bottom of the casing, the pressure on the outsides of the cutters is relieved, allowing the spring to slip the faces 26 of the cutters off of the face 25 of the extension, thus expanding them until faces 18 are expanded sufficiently to pass up over the extension 6 of the body when the cutters are drawn up with their upper ends bearing against faces 8 of the body, the reamers in working position. It is now connected to the walking-beam in the rig and giving the customary vertical motion usually about two to three feet, used in the process of drilling. This is continued until the hole is reamed sufficiently, when it is withdrawn from the hole, the cutters striking the under edge of the casing-shoe, causing them to remain stationary for a short time, allowing the body to be withdrawn from between them sufficiently for the cutters to collapse, when they follow with the reamer-body out of the hole.

(Testimony of W. W. Wilson.)

Q. 13. Please briefly compare and contrast the features of construction and interrelation of parts of "Defendants' Exhibit Double Underreamer" with the construction and interrelation of parts disclosed in "Complainants' Exhibit Double Patent."

A. The "Defendants' Exhibit Double Underreamer" is the same as shown in "Complainants' Exhibit Double Patent," except that, on the cutters there is an added dovetail or ridge, intended to co-act with the body, or, rather with the extension of the body, which dovetail is placed parallel with and at the lower end of the main dovetails on the cutters shown in the patent figure at 29. The slot or pocket 16 shown in figure XII at 16 is changed in the "Defendant's Exhibit Double Underreamer" to extend clear through the cutter at this point. There is added in the "Defendant's Exhibit [190] Double Underreamer" at this point a small hole, in which there can be placed a pin extending across the opening to prevent possible loss of the key, or, also, to prevent its displacement. The face shown in figure XI of the patent above face 26 does not extend to the top of the cutter, but extends within about an inch thereof, where another face is added which is in line with the lower bearing-face shown at 18 in the patent. This upper face is intended to take the strain of the cutters inwardly at this point. In the body shown in "Defendant's Exhibit Double Underreamer," there are added dovetail spaces or notches cut in the lower end of the extension at the sides of the cutter-ways, intended to coact with the



(Testimony of W. W. Wilson.)

extra dovetails described on the cutters when the cutters are in acting position. The lower end of the partition between the cutters shown at 25 in figure IX consists of two angular faces in "Defendant's Exhibit Double Underreamer" instead of being rounded as shown in the patent drawing. These, however, have become worn and more or less rounded.

Q. 14. Have you examined "Complainants' Exhibit Wilson Underreamer" and "Complainants' Exhibit Wilson Underreamer No. 2"?

A. Yes; I have examined both reamers and am familiar therewith.

Q. 15. Please compare and contrast the construction and interrelation of parts and features of these two exhibits with the construction and interrelation of parts and features disclosed in "Complainants' Exhibit Double Patent," following up the comparison, and the like, as directed at structure, with a statement as to similarities and dissimilarities as between said reamer exhibits and said patent exhibit, pertaining to mode of operation and the nature of service, and performance of each.

A. The body shown in the Wilson exhibits consists of a single piece of steel, furnished with means at its upper end for attachment to a string of tools, and on its lower end arranged to receive the cutters; also with a cavity to receive cutter-operating means. The [191] Double patent describes a body made of steel, furnished at its upper ends with means for attachment to the string of tools, said



(Testimony of W. W. Wilson.)

body consisting of two parts, which screw together to allow access to the bore containing the spring and mandrel rod, whereas access to this spring in the Wilson reamer is had through the bottom opening of the bore in the Wilson body extending out below. In connection with the threaded joint in the center of the Double body described in the patent, there is a square or flattened place on the lower piece of the body for the application of a wrench thereto. No such means are necessary in the Wilson body. The lower extension of the Double body consists of the H or I-shaped section shown in figure VII. The main section of this extension forms a partition or spacing-member which lies between the cutter shanks when the cutters are extended or expanded. The Wilson body consists, or has an expansion consisting of two forks or prongs, which are placed at the sides of the cutter-shanks when the cutters are in expanded position. In the Double patent, figure VII, there are grooves provided, shown at 9. These grooves are formed in the sides of the spaces provided for the cutters as shown. In the Wilson reamer these means are replaced by ribs, or shoulders, on the insides of the prongs. In the Double patent, the extension is provided with a hole sufficiently large to allow the mandrel to pass through. This hole is drilled the full length of the extension and extended into the spring bore or hole of the body. Also, the extension is provided with a slot, allowing room for the passage of the key which passes through the mandrel. This slot is long

(Testimony of W. W. Wilson.)

enough to allow sufficient play for the key in operating the cutters. No such means are provided in the Wilson underreamer. In the Double underreamer, shown in the patent, the expansion of the cutters is caused by contact of suitable faces on the cutters with the main body of a wall or partition of the extension shown at 6. In order to allow the cutters to collapse over [192] this extension, pockets are cut in the backs of the cutters, these notches being on the shank or upper extension of the cutter. No such means are necessary in the Wilson reamer. The expansion of the Wilson cutters is accomplished by faces arranged on the ends of the forks or prongs. When the Double underreamer cutters are in collapsed position, there is interposed between them the key, the lower end of the mandrel-rod, also the central portion of the extension of the body at 6. When the Wilson reamer cutters are collapsed, there is interposed between them the lower end of the T-rod and the bottom bolt or safety bolt. The faces of the body extensions, 6, shown in the patent, which coact with the cutters when expanded, are parallel to each other and the axis of the reamer body. In the Wilson reamer the faces which coact with the cutters, causing expansion when the cutters are expanded, are at an angle to each other and the axis of the body. The mandrel and key of the Double underreamer shown in the patent is replaced by a single piece T-rod in the Wilson reamer. The downward movement of the cutters in the Double underreamer is limited by the



(Testimony of W. W. Wilson.)

striking of the key on the lower edges of the slot in the extension. The same movement of the cutters in the Wilson reamer is limited by the means of a pipe placed on the T-rod inside of the spring, which butts against the block on the lower end and the nut on the upper end of the T-rod, limiting their throw or downward movement. The dovetails in the Double underreamer are placed at an angle from the vertical axis of the body, while in the Wilson reamer the shoulders are placed parallel to the axis of the body. The dovetails, 29, of the cutter shown in the patent, figure XI, are placed on the cutter so as to be at an angle to the axis of the reamer when the cutters are in an expanded position. The dovetails on the cutters of the Wilson patent are so placed as to be parallel to the axis of the reamer when in expanded position. On the Wilson reamer, at the bottom, or near the bottom, of the forks, there is a bolt passed through from one fork to the other. No bolt or inserted piece is shown in the Double underreamer patent. [193] In the Double underreamer shown in the patent, the spring is retained at its lower end in position by the counter-bore or shoulder 5. In the Wilson underreamer shown in "Complainants' Exhibit Wilson Underreamer," there is a block which is placed on the T-rod beneath the spring, which block is held in position by side screws, threaded into the interior of the body, which have projections on their inner ends extended in the holes in the block. In the "Complainants' Exhibit Wilson Underreamer No. 2," the spring at its lower



(Testimony of W. W. Wilson.)

end is held in position by a key passed through a slot in the underreamer body at a point above the faces against which the upper ends of the cutters bear when in working position. In order to locate this key centrally, a slot is made in the T-bar allowing its passage. Also in this exhibit the downward motion of the cutters is limited by the upper end of this slot coming in contact with this key. In the Double underreamer, the cutters are expanded to working position first by spreading-means interposed between the backs of the cutters and, second, by the upper ends of the cutters traveling upward on the inclined dovetailed ways, drawing the upper ends of the cutters closer together, which action acting upon the fulcrum or bearing, 18, causes the points or working edges, 19, of the cutters to be still further expanded. In both the Wilson exhibits, the cutters are expanded solely by having expanding means thrust in between the outer edges of the cutter.

In the Double underreamer patent the cutters are expanded by means consisting of a continuous edge or working face acting on each cutter. In the Wilson underreamers, the cutters are expanded by two widely separated faces acting on each cutter.

As to the method of operation, the cutters on each of the Wilson underreamers and also those of the Double patent are drawn to contracted position. The reamer is then entered in the casing and the cutters are retained in contracted position by their contact with the walls of the casing. The under-

(Testimony of W. W. Wilson.)

reamer is lowered to a [194] point beyond the lower end of the casing, when the releasing pressure of the casing allows the cutters to be drawn up into expanded position by the spring pressure, at which time reaming is commenced; and, when it is completed, the underreamer is withdrawn, the cutters striking on the shoe of the casing, causing them to be retained stationary while the body is withdrawn partly, in the case of the Double patent, and completely, with the Wilson exhibits from between the cutters, which allows them to collapse and follow up the casing.

As to the method of assembling the reamers for operation in the Double underreamer patent, there are necessary two sets or divisions in the operation of assembling. First, the spring is put on the mandrel rod, together with the nut, and a cotter-pin, and placed in the lower half of the Double body. The upper half shown at figure II in the patent is then screwed onto the lower half, completing the first operation. Second: Screw 28 is screwed into the lower end of the mandrel rod and means exerted to draw the rod to the lowest position. One cutter is placed in the body and the key, 17, is then put through the slot in the body extension and through the slot in the mandrel and into the pocket, 16, in the cutter. The other cutter is then placed on the body so that its pocket, 16, is over the end of the key, 17. A punch is then put through the hole, 20, in the first cutter placed, and by this means the key, 17, is forced into central position. The rod, 11, then is allowed to partly re-



(Testimony of W. W. Wilson.)

lease, hooking the rod in the slot, 22, in the bottom of the key. The mandrel is then further released, leaving the cutters in working position.

In assembling the Wilson underreamer shown in "Complainants' Exhibit Wilson Underreamer," the block is placed on the T-rod; the spring is placed on the T-rod; the pipe is placed on the T-rod. The nut is then screwed on to the thread on top of the T-rod and retained in position by a cotter-pin. The cutters [195] are then put on the T-rod and then the T-rod with parts thereon and cutters are put on into the body and slid up as far as they will go. Means are then exerted on the block to press it up into position, and the side pins are then screwed into the body so that their extensions extend into the block, supporting it in that position. Then the bottom bolt is screwed into the body and retained with a cotter-pin.

In "Complainants' Exhibit Wilson Underreamer No. 2," the spring is put on the T-rod and retained in position by the nut and cotter-pin at the top. The cutters are then placed on the T-rod and these parts are put into the body. The key is then driven through the slot in the body and by means of its tapered upper edges catches the spring and forces it up into position. The key is then driven on through until it is central with the body, when the extension on the lower side drops down into the bore of the body, retaining it in this position. The bottom bolt is then screwed into the body and retained by the cotter-pin.



(Testimony of W. W. Wilson.)

In comparing the strength of the reamer disclosed in the Double patent and the underreamers "Complainants' Exhibit Wilson. Underreamers" and "Wilson Underreamer No. 2," the body of the Wilson underreamer is shown to have more strength than the Double underreamer by reason of the fact that there is no joint in the middle of the body, it being a single piece. Also, there are no pockets cut out on the sides of the body for the wrench. The dovetails on the Double body shown in the patent, being at an angle to the axis of the body, are necessarily narrow at their lower ends, interposing a small amount of metal at this point to the shearing out of the dovetail which might be caused by a tendency to spread the lower ends of the cutters. In the Wilson underreamers these dovetails being parallel to the axis of the body, they may be placed closer to the axis of the body at the lower ends, giving more strength at this point. [196] In figure VII in the Double underreamer patent, it is seen that there are small bearings which the key butts against at its lowermost position by reason of the fact that there is a limit to the width of the partition interposed between the cutters at said point, and also the hole itself must be sufficiently large to allow free movement of the mandrel rod. This may be cut out or extended down by repeated blows from the key.

In the "Complainants' Exhibit Wilson Underreamer," this strain is taken by the pipe block and side-screws which may be given a comparatively large surface for resistance. The spreading-bear-

(Testimony of W. W. Wilson.)

ing, 6, in the patent may become worn by compression against it of the cutters, and in this way it may be compressed together, tending to close the hole in it in which plays the mandrel rod. This may cause binding of the rod when it is drawn to its lower position. In the Wilson underreamers, if the spreading-bearings become worn or compressed, there are no moving means near these parts which may become jammed or stuck. Also, these points in the body project from the main body of the metal in such way that they may easily be tempered, making the metal hard and highly resistant to wear. This would be difficult in the Double underreamer disclosed, though it may be possible. However, due to the shrinking of the metal, there would be great danger of cracking the metal between the lower end of the key-slot and the bottom of the reamer body or extension.

In the use of the Double underreamer disclosed, it is difficult to get at the spring to clean it out in case it becomes clogged or packed with mud or drillings, as the joint in the body must be unscrewed to accomplish this. The joint in this body is not unscrewed in the ordinary practice of changing cutters. In the Wilson reamer, in order to get the cutters off of the body, the spring as well as the T-rod must be withdrawn from the reamer body for such replacement, at which time the spring may be inspected and cleaned if necessary. [197]

In the cutters disclosed in the patent, there is a notch cut in the back of each cutter to permit their



(Testimony of W. W. Wilson.)

collapsing. No such notch appears in the cutters of either of the Wilson underreamers. The notch necessarily weakens the ability of the cutters to stand either the spreading-action applied to the cutting points, or to a collapsing strain applied to the cutting points of the cutters. It is desirable to have the distribution of the metal in the shanks of the cutters distributed over a wide space along a plane through the center of the cutter perpendicular to the bearing-faces as the main strains placed on the cutter act in this plane. Anything which reduces the thickness of the cutter or thickness of the shank must necessarily weaken the cutter unless greatly widened to compensate. This is particularly the case where the shoe-notch or shoulder shown just below the hole, 20 (Fig. X), of the patent removes the metal; and at this point also the pocket, 16, also appears removing the metal.

In the Double underreamer disclosed, the cutting-faces of the cutters are narrow compared to the diameter of the body. This is made necessary by the fact that if the cutter is widened, it must either be widened throughout its length, which would reduce the strength of the dovetail in the body, or the lower end of the cutter might be widened, which, however, might cause serious prying action on the dovetails of the cutters or of the body. This strain would be caused by an action as follows: In case the underreamer cuts a certain place in the circumference of the hole on one downward stroke, and then on rising should be turned slightly, and then descending strike



(Testimony of W. W. Wilson.)

another blow, this blow would come on one point at one side of the cutter and on the diametrically opposite point of the other cutter. This would cause a collapsing strain on the cutters, which strain is applied to this outer point on one cutter, re-acted against by the central spreading-bearing, causing a strain on the opposite dovetail shoulders. This rocking action would tend to round the bearing-faces of the cutters, placing the center re-action closer and closer to the center of the [198] cutter, giving the strain each time greater leverage on the dovetails, which would be likely to cause their straining and, later, their breaking. In the Wilson reamers shown, the bearing-faces, though the lower end of the cutter may be widened, are still placed at the outer edges of the cutter; and should the faces be battered in, could still not remove the fulcrum to the center of the cutter or near it, and consequently this strain could not occur in the Wilson reamer. The key in the Double reamer disclosed must necessarily be thin; for, if it is thick, a wide slot must be cut in the mandrel rod for its passage there through. This would weaken the mandrel rod and, as before shown, the size of the mandrel rod is limited by the size of the hole that may be drilled through the central partition of the body extension. There is no such limit to the width of the lugs on the lower ends of the T in the Wilson reamers, except that the width of the pocket in the upper ends of the cutters is not widened by this action to the point of weakening it. Therefore, there is less chance for binding or shearing off the

(Testimony of W. W. Wilson.)

end of the T-rod in the Wilson reamer than in bending or breaking the key of the Double underreamer disclosed.

In the working of the Wilson underreamer, it is impossible to dislocate sideways the lugs on the T-rod. However, it might be possible to dislocate sideways the key on the Double underreamer disclosed, which would throw all the strain on the smaller amount of metal, thus acting against the cutter.

In the Double underreamer disclosed, the means of increasing the expansion of the cutters may be altered to give them greater expansion by any or all of the following means: A. The length of the cutter upward from the shoulder, 26 (Fig. XI), might be shortened, thus causing greater tipping in the cutter. B. The length of the cutter extending below the face, 18, may be increased. C. The angle between the dovetails and the axis of the body may be increased. And, D, the width of the spreading-bearing, 6, may be increased. The length of the cutter-shank must not be seriously [199] shortened, as this increases the leverage of the cutters against the dovetails. This leverage is also increased by lengthening the cutters downward from the face, 18. This is also objectionable to depend on. As the cutter wears, this length is decreased and, if this is depended on for expansion, the cutters may be worn back for a reasonable length and then when it is dressed out sufficiently to ream the hole large enough, the reamer cannot be run down the casing. The



(Testimony of W. W. Wilson.)

angle of the dovetails cannot be materially increased because, if so, the strength of the lower ends of the dovetails is weakened, making them liable to be torn out. The width of the spreading-bearing, 6, cannot materially be widened because it requires that in order to collapse the cutters, a deeper notch must be cut in the shanks thereof. Also, this would leave less room in the body of the shanks. Therefore, they would have to be narrow. In the Wilson underreamer, the expansion is caused by the spreading-faces of the lower end of the prongs of the extension, which are forced between suitable shoulders on the edges of the cutter body.

**Testimony of Bert Lewis Culver, for Defendant.**

BERT LEWIS CULVER deposes and testifies as follows:

My name is Bert Lewis Culver; age, 40 years; residence, Whittier, California; occupation, oil well superintendent. I have been engaged in the business since I was fifteen years old. Have operated in Pennsylvania before coming to California. Have worked in various old-fields in California. Have been with the Central Oil Company of Whittier for several years. I also operated in Wyoming. Have been acting as field foreman for the Central Oil Company. Am to take a position with the Premier Oil Company at Coalinga on the first of the month. Have operated the Austrian underreamer. The first was the Austrian underreamer. Probably in the year 1900. [200]

Q. 24. Please tell us about the experience you had



(Testimony of Bert Lewis Culver.)

with this Austrian reamer at that time; also specify, if possible, where in Los Angeles it was you had the experience.

A. It was on the Rex Oil Company's property on Adobe street, in Los Angeles. I think the first well was number 6. Previous to that time we had no underreamer, no way of getting casing down, and the only way we could do when we met that hard formation was to stop our casing, as we could not drive it through. The first time we used the Austrian underreamer it was successful, and we thought it was a great thing. It was a great thing. The first one I used was with a  $5\frac{5}{8}$  casing. I was able to lower the casing after using it. Probably reamed three hundred feet. I used the Austrian underreamer many times after that for about two years. I cannot state the wells. I have used the Leidecker, Double and Wilson underreamers. Used the Leidecker after having used the Austrian. That was in 1903, possibly.

Q. 37. Please tell us about this use, as to where it occurred and what further you have to state about it.

A. I used the Leidecker reamer on a well I was drilling at that time by contract for W. E. DeGroot, on Sixth street, beyond Western, directly back of what was known at that time as the Pellisier ranch, Los Angeles. I was using, had been using, an Austrian reamer. We encountered a hard shell—possibly seven feet thick we found afterwards—and we had spent a great deal of time, possibly three or four days, with the Austrian reamer, and came in town

(Testimony of Bert Lewis Culver.)

and got the Leidecker, or Swan, as it called there—which is one and the same. I took it out with me early in the morning and brought it back at night and got my casing through the hard shell.

Q. 38. Did you use this reamer after that occurrence? A. Of the make of reamer, do you mean?

Q. 39. The same kind of reamer; yes. [201]

A. The next time I used the Leidecker reamer was in Wyoming. The firm I was with sent to Los Angeles and bought one.

Q. 40. Where in Wyoming, and when?

A. Evanston, Uinta County.

Q. 41. And when?

A. About six months after that.

Q. 42. Please state your experience with the reamer there?

A. I used it to good advantage; was successful with it. Had some trouble getting it down the casing in each instance I used it, however. It did the work after I got it down.

The next reamer I used was the Double. That was on the Central Oil Company's property at Whittier in 1905.

Q. 51. Please tell us about this experience with the Double reamer in 1905 at Whittier.

A. We had at that time on the Central Oil Company's property, I suppose, every sized reamer that the Double people made; used them every day, probably every working day, in the month or year, and used them successfully. We had some trouble from time to time, losing cutters, but so far as the ream-



(Testimony of Bert Lewis Culver.)

ing goes, the reamers did the work. They are a good reamer—superior to the ones that I had used previous to that time.

Q. 52. Can you tell us how the losses of the cutters occurred?

A. Sometimes by cutters breaking at the key-hole, sometimes by the T-bar breaking. At that time they made what I would term a T-bar that was unlike this key they put in now. They had a tongue on this key that ran up the reamer a ways, if I remember right. Sometimes that T-bar, I would call it, would break in two in the middle and leave both cutters in the hole. I never fished one out in my life. We always had to drill them up. Sometimes those cutters, or pieces of cutters, would get behind the casing, cause dents in the casing, and compel us to pull out casing to remove the joints that had the dents in them. [202]

Used first Wilson reamer in about 1907. Are still using those Wilson reamers on that lease. We used some Double's during that time. The safety bolt in the bottom of the Wilson reamer is to keep the cutters from dropping out. The Wilson reamer gave splendid success. Don't recall an instance of losing a Wilson Underreamer Cutter.

A. 64. For some reason unknown to me, I have had less trouble getting the Wilson reamer started on a shell than I have the Double. I can't explain it, and never could.

Q. 65. I suppose one difficulty in determining that reason was that you could not see what it was doing



(Testimony of Bert Lewis Culver.)

there? Am I right in that? A. Yes, sir.

I think the Central has only one Double reamer in use at this time. Some Wilson reamers came to us without safety bolts in the bottom but we put them in.

Q. 77. Have you any general preference as between these two types of underreamers, the Wilson and the Double? A. I have.

Q. 78. Please state that. A. The Wilson.

Q. 79. Have you any other reasons for this preference which you care to state, further than those mentioned?

A. My one preference is I consider the Wilson a safer reamer to run in the hole, and my experience has been, having the protection of the safety bolt against loss of cutters.

Cross-examination.

(By Mr. LYON.)

Q. 80. Then you would not consider that the Wilson underreamer would be a safe reamer to run in the hole if you removed this safety bolt? [203]

A. No, sir.

Q. 81. You would not?

A. May I recall that answer?

Q. 82. You can amplify it if you wish to; yes.

Mr. BLAKESLEE.—Explain it.

Mr. LYON.—Explain it all you want.

Mr. BLAKESLEE.—Make it just as you want it.

A. Well, I consider it as safe as the Double without it, but, with it, safer.

Q. 83. (By Mr. LYON.) How does this safety

(Testimony of Bert Lewis Culver.)

bolt in the Wilson reamer render it, in your opinion, more safe than the Double?

A. This cutter cannot get off of there until it gets down.

Mr. LYON.—Witness refers to head of the spring-actuated rod in “Complainants’ Exhibit Wilson Reamer.”

A. I consider the construction of that T stronger than the Double. It makes it safer.

Q. 84. Your preference, then, is for the head of the spring-actuated rod to be formed in one piece, or integral, with the spring-actuated rod. Is that it?

A. Yes, sir.

Q. 85. What would be the effect, in the Wilson reamer, if one side of this T-head should break? You would lose the cutter on that side, would you not? A. No, sir; I don’t think you would.

Q. 86. Why not?

A. Because I don’t think that piece could get out of the cutter. As long as it was in the cutter it would rest on the T-bolt.

Q. 87. That is due to the fact, then, that the sockets for the head of the T-bolt in the cutters of the Wilson reamer do not extend clear through the cutters? A. Yes, sir. [204]

I have found considerable prejudices among drillers in California as to different reamers, depending upon their personal experience. I consider the Double underreamer a stronger reamer than the Austrian. Loss of tools in the hole is some times due to carelessness and is sometimes due to defective tools.



(Testimony of Bert Lewis Culver.)

I have used Austrian underreamers in Whittier, on the Central property since we got the first Double reamer. The Murphy Oil Company at Whittier is still using the Austrian underreamers. It is called the Austrian—they call it the Plotts. It is similar in construction. I find no such key in “Complainant’s Exhibit Wilson Underreamer” as that found in the Double underreamer. That metal immediately surrounding the slot in the Double underreamer body acts as a bearing for the cutters; when in expanded position the cutters bear against it.

The tool-dressers and drillers at the wells dressed the bits for our Double and Wilson reamers. When a cutter has run long enough, or immediately it begins to do its work, it begins to wear on this wearing surface, as we term it; and the cutter, to do efficient work, must be kept out so this point clears every other part of it—a keen-cutting surface as that has. (Pointing to the lower edge of cutter of “Complainant’s Exhibit Double Underreamer.”) I mean by “dressing” that we kept this cutting edge out flush with the back part of the reamer, and tried to keep it further, as this one is dressed. (Witness refers to cutter of “Complainant’s Exhibit Wilson Reamer.”) The Double reamer bit to which I have just referred has not been dressed. The Wilson bit has, about three-eighths of an inch. “Dressing” is done by putting the bits in a fire, getting sufficient heat to work them nicely. Good judgment has to be exercised not to overheat. They are heated to a red heat, then upset with a hammer, then tempered.



(Testimony of Bert Lewis Culver.)

Care is required in the tempering. Some times we have difficulty in suitably dressing and tempering these bits at all; some times they crack, check. Very often we get a tool-dresser who is not sufficiently [205] skilled to do the best kind of work; have considerable trouble in that line in California; before coming to Whittier from Wyoming, I had heard of the Double reamer, because it was a good reamer. I suppose that good things get a reputation; had very little use for an underreamer in Wyoming.

Q. 115. How long did you continue in Wyoming?

A. Two years, exactly.

Q. 116. And what kind of wells were you drilling there? A. Oil wells.

Q. 117. And how many did you drill? A. Two.

Q. 118. What depth?

A. One of them twenty-one hundred and the other eighteen hundred feet.

Q. 119. What were the formations which you encountered in Wyoming? A. Hard sand and rock.

Q. 120. Much of it?

A. Broken and in streaks. The character of the formation was mostly a hard, sandy formation.

Q. 125. When drilling for the Rex Oil Company here in Los Angeles, in about 1900, did you have much use for an underreamer? A. Yes, sir.

Q. 126. At that time had you ever heard of any other underreamer than the Austrian? A. No, sir.

Q. 127. Would you at that time have used the Austrian reamer if you could have got at that time a Double reamer? A. No, sir. [206]

(Testimony of Bert Lewis Culver.)

If I had known of the Double reamer then I would not have used the Austrian. The Double reamer is a better reamer, its construction is stronger, and it had more cutting surface. We very often break various tools during the drilling operation. It is very severe on all of the tools. One of the expenses of drilling wells in California is due to the great number of breakages of tools and losses of tools. I mean tools lost in the well necessitating fishing jobs. These are due often to the carelessness on the part of the driller, and sometimes to defective tools. Carelessness of the driller in not properly running the tools, not properly setting up joints, etc. After I first got hold of a Double reamer the only time I used an Austrian was at Whittier. It was a 6 $\frac{1}{4}$  inch reamer. Had no other that could be used at the time—or perhaps the others were all in use. Used it very little, possibly reamed two or three feet.

Q. 144. Then, to sum up your testimony, you would not consider the Austrian underreamer either a practical or a safe tool to use on a hard job of underreaming? Is that correct?

A. No, sir; I would consider it a back number.

Q. 145. Your answer to my question, which was put to you in the negative, might infer that you disagreed with the question. You meant that you would not consider it a safe tool or a practical tool to use on hard reaming? Is that the idea?

A. That is what I mean.

Q. 161. Comparing the modes of expansion and contraction—and by that I mean the action of the



(Testimony of Bert Lewis Culver.)

bits in swinging from their collapsed position to their expanded position, or from their expanded position to their contracted position, and the surfaces on which they ride, are not these substantially the same in the Wilson and the Double reamer?

Mr. BLAKESLEE.—Objected to as assuming a fact or result not testified to, or with relation to, by the witness.

A. I can see but very little difference. [207]

Q. 162. (By Mr. LYON.) The Wilson reamer has two parts which the side faces and shoulders ride in, in expansion, has it not? A. Yes, sir.

Q. 163. While the Double has simply a single face?

A. It has.

Q. 164. Both the Double and the Wilson reamers have side slots which have dovetails which coact with dovetail-shoulders on the bits, have they not?

A. Yes, sir.

Q. 165. And in both reamers these act in the same manner, do they, and for the same purpose?

A. They operate the same way. It is up and down the same way.

Q. 166. And they are for the same purpose?

A. To hold the cutters to the body of the reamer.

#### Redirect Examination.

Q. 170. (By Mr. BLAKESLEE.) Please tell me what you meant, in your cross-examination, by the slot at the lower end of the body of "Complainants' Exhibit Wilson Underreamer?"

A. Why, I meant that.



(Testimony of Bert Lewis Culver.)

Mr. BLAKESLEE. — Witness points to the space—

Mr. LYON.—Witness points to the cut away—

Mr. BLAKESLEE.—“Space” is better.

Mr. LYON.—between the lower end of the parts of the end of the Wilson underreamer, which parts have been termed “forks” by him.

Mr. BLAKESLEE.—“Forks” or “prongs.”

Mr. LYON.—“Forks” or “prongs,” and which portion has been referred to by other witnesses as a “slot.”

Q. 171. (By Mr. BLAKESLEE.) Please compare this opening with the corresponding slot you refer to in “Complainants’ Exhibit Double Underreamer.” That is this one (showing). [208]

A. The Double reamer has a slot in it I should say four inches long, possibly three-quarters of an inch wide. I am describing the key-way.

Q. 172. What is that slot formed in?

A. In the bottom of the reamer, bottom of the end.

Q. 173. Do you find any such key-way in “Complainants’ Exhibit Wilson Underreamer?”

A. No, sir.

Q. 174. Please state what parts of “Complainants’ Exhibit Double Underreamer” and “Complainants’ Exhibit Wilson Underreamer” are between the bodies of the cutters?

A. The Double reamer is closed at the bottom, having the slot as I describe; while the Wilson reamer is not closed at the bottom.

(Testimony of Bert Lewis Culver.)

Q. 175. Do you find in "Complainants' Exhibit Double Underreamer" anything corresponding to the safety-bolt you have referred to in "Complainants' Exhibit Wilson Underreamer?"

Mr. LYON.—Objected to as leading.

A. I do not.

Q. 176. (By Mr. BLAKESLEE.) When you referred to the Austrian underreamer as "a back number," please state what you meant by that, more fully.

A. I meant we had something so much better that it would be folly to use anything of that kind.

Q. 179. I believe you have testified you had breakages occur in the bits, in the shanks, of the Double underreamer used by you, at the openings of the shanks. Have you any explanation to offer as to the breakage at this point?

A. My reason would be that the hole clear through weakens the bit.

Q. 182. Can you state what happens in the Double underreamer, when the cutters are collapsed? [209]

A. It makes it smaller.

Q. 183. Can you state what happens, at this time, with respect to the ends of the key and the recesses in the cutter-shanks in the Double reamer?

A. Well, it is hard to tell what happens. That is a pretty hard question to answer. I know that is the time the key breaks, when it does break. It is the only way it could break. The only reason why it can break is when it is down against the bottom of that



(Testimony of Bert Lewis Culver.)

slot. The distance of the cutters coming into the pipe causes it to break.

Q. 184. In the collapsing of the cutters of the Wilson underreamer, please state how the shanks of the cutters move when the cutting ends of the cutters move down over the spreading-ends of the prongs?

A. The slots in the cutters roll on the ends of the T-bar. They move on a roll,—have a rolling movement.

Recross-examination.

(By Mr. LYON.)

Q. 190. When you say “rolling,” as applied to the movement of the Wilson bit on the head of the spring-actuated rod, you mean a tilting or pivotal movement?

A. Yes, sir; I mean that movement.

Q. 191, And that is permitted by the key-seat or socket in the shank of the bit being larger than the head of the T-rod?

A. It is permitted by its having sufficient room to tilt.

**Testimony of J. Benson Wrenn, Defendant's  
Witness.**

J. BENSON WRENN deposes and testifies as follows:

My name is J. Benson Wrenn; age, 55; manager of Traders Oil Company. I have full charge of the development or production department. Have been in the oil business since 1898. My experience brought me very extensively in touch with oil well tools.



(Testimony of J. Benson Wrenn.)

[210] Am acquainted with the various kinds of underreamers. I used an Austrian underreamer in 1899. Owing to the fact that the driller who first used it was intoxicated he did not run it below the casing and operated in the casing, cork-screwing the casing.

My next experience was at Coalinga in 1907. I bought and ran three Wilson,—10 inch, two eight and a quarters, and six and five eighths, using them continually from that time on. During that period I also used one Double of the older pattern, 12½ inch. I now have four or five Double reamers. “Complainants’ Exhibit Double Reamer” is the general type, of course they have made slight differences in them, and improvements, of course. This exhibit represents the general plan of both the first and second kinds of Double reamers. I don’t know that I could specify the change made in the Double reamer unless I had the first Double reamer before me. The new reamer has more stock in it—much heavier,—a very great improvement over the old. I was rather unfortunate in the use of the first Double reamer and became considerably prejudiced against the reamer, in that the joint of the 12½ that I was using, the pin, broke off, leaving the whole bottom part of it in the hole, causing me to have to move the derrick and drill a new hole. That was in 1907 or 1908. The pin broke off square and we could not fish it out. We had to move the rig and redrill the hole. I should judge the abandoned hole had cost me to that date between fifteen hundred and two thousand dollars.

(Testimony of J. Benson Wrenn.)

The underreamer itself I had to pay for, which was, I think, three hundred and some dollars. It was rented.

My experience with Wilson underreamers was very satisfactory. I have used six or eight Wilson underreamers. The Wilson reamer body having no middle joint did not give the trouble I had with the Double. I probably drilled forty or fifty wells with Wilson underreamers. I have Wilson reamers re-machined. It makes practically new reamers of them. You cannot perform such an operation on the Double reamer. [211]

During the use of the Double underreamers I think I have never had occasion to repair them. I have used the Double as extensively as the Wilson. I don't think the re-machined Wilson reamers were as good as the original, still they give very fair service. I always considered that the Wilson was the safer machine or tool because it had no joint in it, basing, of course, my idea—deductions—on the accident I had from the joint. I still have in use Wilson reamers purchased in 1907 or 1908 and Double reamers purchased in 1909 or 1910. There are no other reamers in use in our field except the Double and the Wilson. I think there are more Doubles in use than Wilsons, I don't know.

I have lost the cutters or lugs off Wilson reamers, due to breakages inside the Wilson reamer. I have lost both cutters or lug, and I have lost one. In one case I also lost the spring-actuated rod. This Wilson reamer had in it the bottom or safety bolt. In this



(Testimony of J. Benson Wrenn.)

case the dowel-pins broke. I never had any difficulty in losing tools in the well hole, except the loss of this portion of a Double reamer, which I have referred to, I lost the two Double lugs, by splitting, and this loss of parts of the Wilson reamer. I mean parts of underreamers. Other tools, yes, I have lost hundreds of them in the hole. I lost a drilling bit in the well hole by reason of the joint unscrewing. That was due to lack of proper facilities for setting up the joint. Fishing for lost tools is one of the common and unfortunate experiences in drilling wells. It is due to various breakages of the tools and to the carelessness of the drillers. I never had a Double or Wilson reamer key-seat as that Austrian did.

Q. 108. Is there any particular difference, in your opinion, based upon your experience, with the Double and the Wilson reamers, in the manner in which said reamers are constructed to procure the collapsing and expansion of the bits or cutters?

A. I think they are very different.

Q. 109. In what respect? [212]

A. Well, the Double is set in through this joint, whereas the Wilson is held by these dowel-pins and the block.

Q. 115. And your prejudice against the Double underreamer arises from the loss of the lower portion of this Double reamer in the hole due to the breaking of this pin?

A. It was, at that time. I can't say that I am prejudiced against it now—the new improved Double.



(Testimony of J. Benson Wrenn.)

Q. 116. Well, hasn't the new improved Double the same pin at the box joint?      A. I think so.

Q. 117. And then, if I understand you correctly, you would say that, in your opinion, either that the Double was as good as the Wilson or the Wilson was as good as the Double?      A. The improved; yes.

Q. 118. And from your standpoint you see practically no difference whatever between the two reamers last referred to?

A. There is a difference in the structure of the reamer, but not in the service of it.

The only advantage in re-machining a Wilson reamer is that you can get some service out of it before you put it into the junk pile. I have never had a Double underreamer re-machined.

**Testimony of William W. Wilson, for Defendant  
(Recalled).**

Testimony of WILLIAM W. WILSON, cont., recalled.

The witness continues his answer to question number 15:

A. The expansion of the Wilson underreamer can be made large due to the fact that the cutters collapse completely together in closed position, and there being none of the body interposed between them. The cutters may be expanded widely, due to the fact that there is a very little limit to the widths that the spreading-bearings on the bottom of the prongs can be made, except to leave [213] strength in the over-hung spreading-bearings in the bottom

(Testimony of William W. Wilson.)

of the cutters sufficient to stand the strain. The bottom bolt is a feature of the Wilson reamer which does not exist on the Double reamer, and allows, in addition to the usual means which limit the lowest travel of the cutters, a separate and unused means of catching them under ordinary circumstances. This bolt comes into use only when excessive wear or breakage of other means provided for limiting the cutters is allowed.

The tapered bearings shown at the sides of the prongs at the bottom of the Wilson extension allow the cutters to be drawn into their final expanded position with great force, due to the gradual taper of these bearings and strength of the spring. This allows the cutters when lowered below the casing and when no shell has been formed—in other words, the diameter of the hole below the casing—is that or nearly that of the inside of the casing. This taper allows great pressure to be exerted against the sides of the hole, and in this manner a shell may be started in a short time, which, as soon as opened up to the full diameter to be underreamed, allows the cutters to be in complete expanded position, allowing further reaming to be carried on in the usual manner. The expansion of the Double underreamer caused by the steep, angular spreading-bearings at the bottom of the extension or partition allows only small force to be placed against the spreading-action of the cutters, until they are almost in complete expanded position. The Double cutter, in order to completely collapse, must have the upper ends of the cutters thrown



(Testimony of William W. Wilson.)

outward so that the dovetail shoulders on the cutters bear against the outer sides of the ridges or undercuts in the body of the extension. When these parts become worn, when the cutters are collapsed running down the pipe, the friction of the pipe, also blisters, and irregularities at the joints, may, acting on the riding surface of the cutter, tend to rock the cutter on the spreading-bearing, throwing the [214] upper part of the shank in and pitching the lower points out. When the cutter is worn badly and dressed out at the sides, this may make it difficult to get the reamer down the casing. At such time the tying of the cutters together is resorted to. The riding surface of the Wilson cutter being longer than the Double, and there being no tilting action of the cutter, this does not occur.

As to the variations possible in the construction of the two, it will be seen that the Double cutter may be narrowed until such cutter body or lower part is no wider than the width of the shank outside of the dovetail shoulders. Also, the body of the cutters might be decreased still further in width. Still the cutter would be operative. Consequently the action of the cutter does not depend on the extension of the cutter body outside of the dovetail shoulders. In the Wilson cutter, if the cutter body is narrowed to the width of the outside of the dovetail shoulders of the cutters, the cutter will be inoperative. In other words, the action of the cutter depends on having the body of the cutter extended sideways to a width greater than the outside of the dovetail shoulders.



(Testimony of William W. Wilson.)

Q. 16. (By Mr. BLAKESLEE.) I wish you would particularly compare the modes of operation and particularly define the centers of motion of the cutters of "Complainants' Exhibit Double Underreamer" and "Complainants' Exhibit Wilson Underreamer" and "Wilson Underreamer Number 2," in the collapsing action of the cutters.

A. In the "Complainants' Exhibit Double Underreamer" the cutter at the beginning of its downward travel in collapsing has its upper end slightly raised outward, due to the angle of the dovetail, and tilts or tends to revolve over a center which travels, in respect to the cutter, up over the lower, inner spreading face of the cutter, but which center is stationary with respect to the body and is located at the corner of the parallel bearing face and angular bearing face at the bottom of the partition of the body. This action is continued until the moving center, with respect to the cutter, reaches the beginning of the notch on the cutter back, [215] at which time the movement of the cutter changes to a center probably moving but which is difficult to determine without drafting, caused by the inward tipping of the lower end of the cutter and the continued outward tipping of the upper end of the cutter. This action continues until the cutter is in a completely collapsed position.

In the Wilson underreamer shown in "Complainants' Exhibit Wilson Underreamer" and "Wilson Underreamer Number 2," the collapsing consists of a pivotal action of the cutter, the center of this action

(Testimony of William W. Wilson.)

being at the point where the dovetail shoulders on the cutter begin to be beveled away at the top of the shank. The point of contact or intersection of these two planes forms a line, which line is the center of the tilting action of the cutter. The first part of the collapsing is caused by the gradual collapsing of the cutter due to the riding surfaces on the backs of the cutters traveling down the slightly tapered parts of the extension bearings on the bottom of the prongs of the extension. The second part of the collapsing is caused by the rounded corner where the riding face on the backs of the cutter meet the tops of the side-wise extension of the cutter back, these points traveling over the steeply tapered faces of the bottom of the body prongs. The travel of the center of the tilting cutter with respect to the body is at all times a straight line. The line through the cutter constituting its center traveling downward, forms a plane or describes a plane, in which plane lie the inner faces of the dovetail shoulders on the inside of the prong. In other words, the tilting of the cutter of the Double underreamer is about a centroid or moving center with respect to the cutter. The tipping Wilson cutter is about a center, stationary with respect to the cutter.

I am employed by the Wilson & Willard Manufacturing Company, the defendant in this suit, and a brother of Elihu C. Wilson, the president of that company.

Q. 19. I now show you a copy of patent number 683,352 of the Swan underreamer, issued September



(Testimony of William W. Wilson.)

24, 1901, and ask you if you are [216] acquainted with the disclosures of this patent. A. I am.

Q. 20. Will you briefly summarize the construction, interrelation and mode of operation of the subject of this patent?

Mr. LYON.—Objected to on the ground that the said patent is not a part of the art prior to the invention of subject matter of the patent in suit by Edward Double.

Mr. BLAKESLEE.—Attention is called to the fact that this patent of Swan issued upon a day antedating the date of the application which eventuated in the patent to Double in suit, and it is therefore contended that this patent to Swan is wholly and without qualification in the prior art in respect to the Double patent in suit.

A. This underreamer consists of a body comprising two parts, said parts being joined together by threaded portions to allow access to an inner chamber in which is placed a spring intended to actuate the cutters. Through the lower half of the body is a hole drilled axially, allowing the passage of a rod which terminates at its upper end in a head or button against which bears the top of the spring. The lower end of the spring bears against and fits over a shoulder turned on the upper end of the lower half of the body. This rod extends downward between the parts of the body on which the cutters ride. In the extension of the body or part thereof below the faces against which the cutters bear in their working position, shown in figure 3 at A9, there is a centrally



(Testimony of William W. Wilson.)

located slot passing through the extension in a plane perpendicular to the backs of the cutters, in which is allowed to play a key, which key passes through a slot in the lower end of the mandrel rod shown in figure 7 at B3. In each end of the key shown at B4, figure 15, are holes shown at b4 for the passage of suitable retaining means for maintaining the key in central position. These retaining means fit into or are allowed placing by the extensions of the slots in the cutters; said slots shown in figure 13 at C2, [217] said extensions of this slot shown at C3, figure 13. In the sides of the extensions are pockets planed out for the reception of cutters. These pockets have under-cut shoulders or dovetailed spaces machined in their sides for engagement with the dovetails on the sides of the cutters, said dovetailed space shown in figure 3, A7. The faces the cutters travel on, together with the dovetail faces, taper inwardly at their lower ends. To facilitate running the reamer into the casing, additional retaining means are furnished by a shoulder shown on the mandrel rod, figure 7, B5. In the sides of the body above the extension are placed engaging means, the outer ends of which consist of rectangular pieces which have inward extensions shown at E, figure 10, which bear against the button on the mandrel rod when the reamer is being run in the casing. The rectangular ends of these retaining means at this time bear against the insides of the casing, and hold the mandrel rod in the lowest position which retains the cutters in contracted position. The expansion of the

(Testimony of William W. Wilson.)

cutters is caused by a travel along the tapered inner faces of the extension, from lower position to upward position. The upper ends of these faces being wide apart, causes the cutter to expand to working position. The upward strain on the cutter is taken by its abutment against the shoulder, A9, figure 3, in this position. To operate the reamer the cutters are drawn to the lowest position. A removable ring, figure 9 at G, is then placed over the retaining means as shown in section in figure 5, holding them in against the button on the mandrel rod. The reamer is then placed in the casing and lowered until the casing displaces the ring G in figure 9, when it is removed by the continued lowering of the reamer. This leaves the retaining means still pressed against the casing. The reamer is then lowered beyond the lower end of the casing, when the retaining means are forced outward, allowing the passage of the button B5 to pass upward, due to the pressure of the spring. This continued travel [218] draws the cutters up into working position and reaming is commenced. When through reaming the reamer may be withdrawn into the casing, the casing striking the faces shown at A, figure 14, of the cutters, forcing them downward in a collapsed position and allowing the reamer to continue upward through the casing.

I have seen a number of those reamers. I saw them in Bridgeport, Illinois, in the oil fields of 1909. I spent considerable time in the oil fields of Illinois at that time with Mr. J. M. Woods of the Bridge-



(Testimony of William W. Wilson.)

port Machine Company. He was agent for Swan underreamers in that field. He showed me a large number of Swan reamers in his warehouse at Bridgeport. I saw one Swan underreamer being used at that time. I saw the the Swan underreamer being withdrawn from the hole after underreaming. I saw probably twelve or fifteen Swan underreamers of different sizes in that field. They had all shown evidence of use.

A. 26. I was in Bridgeport at that time to investigate the underreaming business. I spent considerable time in the field in company with Mr. J. M. Woods, of the Bridgeport Machine Company, and in his company met Mr. Curt Doane, who was the agent of the Swan underreamers in that field. Mr. Doane showed me a large number of Swan underreamers in his warehouse at Bridgeport, and we later went into the field and saw one underreamer being used and three or four other wells where they had just completed underreaming operations with the Swan underreamer.

A. 33. All three exhibits disclose bodies consisting of two parts, particularly "Exhibit Swan Underreamer Patent" and the "Complainants' Exhibit Double Underreamer," said body parts being connected together by threaded portions, said parts being joined together for the purpose of giving access to a large bore in which a spring is placed, and for the removal and placing of the mandrel rod. The spring in all the exhibits on its lower end bears upon a portion of the lower half of the body, and its upper

(Testimony of William W. Wilson.)

end bears against, in one case, the solid part of the mandrel rod, and in the Double underreamer [219] against a nut threaded on the upper end of the mandrel rod. The mandrel rod extends through the lower half of the body in all the exhibits and into the extension thereof. The mandrel rod at its lower end in all the exhibits consists of the enlarged portion in which there is an elongated slot for the reception of a key. In all the exhibits there is a key passing through a slot in the extension of the body and also through the slot in the lower end of the mandrel rod, and bearing on its ends against slots in the cutters, the key in all the exhibits being long enough to at all times have its ends within slots in the cutters. The ends of the bodies of the Double underreamers shown and the end of the body of the Swan underreamer disclosed, shown particularly in figure 6, show an H or I section whose widest parts are the circumference of the body. Into the sides of this section are spaces for the placing of the cutters, which cutters in action remain for the most part therein.

Testimony of W. W. WILSON resumed—Answer to Q. 33 (Cont.).

I believe from the former report of my answer, I described the pockets at the side of the slot of the cutters shown in figure 13, Swan patent, C 3. These pockets being for the purpose of allowing room to insert retaining pins in the end of the key shown in B 4, figure 15, and a small pin, b4, figure 15. The cutters on the Swan reamer shown are expanded by



(Testimony of William W. Wilson.)

moving up the wedge-shaped extension with the dovetails in the dovetail ways shown in figure 3, A 7, thus causing expansion. In the Double underreamer shown the dovetails cut in the body are tapered inward at their upper ends. As the cutters slide upward in these ways, the upper ends are drawn inward, causing expansion of the cutters, due to the fact that the dovetail action is imparted to the cutters at a point above the fulcrum of the cutter. This action reverses the taper of the dovetail ways in order to accomplish the same result as the dovetails [220] in the Swan reamer act directly on the cutting points and not over a fulcrum. In both reamers the cutters in an expanded condition stand against the shoulders at the upper end of the extension of the body. In both reamers the cutters are limited in their downward movement by the key striking on the lower end of the slot of the extension of the reamer body. In the Swan underreamer small holes shown, c 4, figure 14, are made in the backs of the cutters for the application of suitable toggle to draw them down to contracted position preparatory to placing in the pipe. In "Defendant's Exhibit Double Underreamer," similar holes are shown on the backs of the cutters where the shank of the cutter joins the body of the cutter. These holes are used for a similar purpose.

While in Bridgeport, Illinois, in 1909 I saw one Double underreamer. It was the old style Double reamer. It was an 8".

The dovetail ways had worn so that the cutters were very loose in the body, and the cutters were

(Testimony of William W. Wilson.)

bent at the center of the shank, showing that they had been up against hard use.

In describing the Day underreamer covered by Patent No. 403,877 will say: This reamer consists of a stem rounded at the lower end for the spring. At the lower end of the rod F is a block G fastened thereto by pin through the block. In the block G are shoulders against which the cutters may bear when in expanded position. Below the shoulder H is an extension, I, which has an enlarged end, which extension is always between the cutting bodies, B. The cutters consist of bodies whose sides extend upward in flattened parts at D, forming a spring allowing sidewise movement of the cutter-head. These parts, D, at their upper ends are enlarged into pieces, E, which on their inner faces bear against the square portion of the rod, F, and which pieces are [221] fastened rigidly together by plates. As the cutters are drawn downwardly they collapse over the spreading head interposed between the cutters. The spring actuates the cutters by raising them upwardly and they expand over the spreading head on their upward motion. In comparing the Day underreamer with the Double underreamer will say that the Day underreamer discloses two cutters movable on the body, said cutters moving downwardly to contract and upwardly to expand, controlled by a spring. In this regard the action is the same as the Double. The Day cutters have pockets or grooves cut across the back to permit them to collapse over the spreading bearing. This is similar to that found



(Testimony of William W. Wilson.)

in the Double cutters. The Day cutters are allowed to spring by reason of a flexible shank to which they are attached.

I have examined the underreamer shown in Oil Well Supply Company's catalogue bearing date of 1900. The reamer consists of a body with cutters attached which collapse over a spreading bearing at the lower end and which cutters are spring actuated. The cutters bear or take up the thrust bearing at the upper end against shoulders on the body. The cutters have spaces cut out in their back. The cutters are attached to a spring actuated means by a pin which pin extends through a slot in the body. They collapse by being drawn downward below the spreading bearing and by the groove at the back of the cutters.

The model disclosing the Day underreamer was made at the Wilson and Willard Manufacturing Company's Shop.

In comparing the underreamer disclosed in cut No. 2161 of Oil Well Supply Company's catalogue of 1900, with a Double underreamer, complainant's exhibit, and defendant's exhibit, will say: Both reamers consist of bodies furnished with suitable means for attaching to string of tools. On their lower ends are two cutters which travel upwardly into expanded position and downwardly into contracted position. There is an extension on the body between the cutters which at all times remains between the cutters, and [222] over which extension or partition the cutters collapse. In all cases the cutters have

(Testimony of William W. Wilson.)

grooves planed across the backs to permit tilting or collapsing over the spreading wall or partition. The body extension of both reamers have suitable slot sufficiently long to provide for vertical travel of cutter controlling means.

In each there is a body with means for connecting to a string of tools at the top. The body is hollowed out along its axis for admission of spring and cutter retaining rings, access to which is had in the Double patent by a joint in the body, and in the O'Donnell & Willard underreamer the lower partition furnished at its upper end with a plug threaded into the body at that point, thus allowing admission to the spring chamber. The lower end of the mandrel rod in the Double reamer has a movable key, while in the O'Donnell & Willard it consists of a solid T-head on the rod. The ends of this T bear against the upper portions of slots in the cutter shank, as does the key in the Double reamer. The cutters on being withdrawn in the O'Donnell & Willard reamer close together over the lower portion of the removable partition. In the Double reamer they close together over a stationary partition between the cutters. This partition in both cases has a hole for movement of the cutter supporting rod, and in both cases is furnished with a suitable slot, which is long enough to permit travel of the key or T to give suitable movement for the cutting. The cutters in the O'Donnell-Willard reamer have shanks which fit into pockets formed in the end of the body. The outer faces of these pockets are tapered inwardly at their



(Testimony of William W. Wilson.)

upper ends, causing the cutters at their upper ends to be drawn together as the reamer is expanded. In the Double underreamer, a similar action is accomplished by the dovetail ways, which dovetail ways are tapered together at their upper ends. The collapsing of the cutters in both cases is caused by the cutters dropping down over the end of the partition, and also by the outward tilting of the upward end of the cutters, caused in the one case by the tapered pockets [223] and in the other by the tapered dovetail ways. The bearing of the cutters at their upper ends is taken by suitable shoulders on the body in both cases. In the Willard-O'Donnell reamer, additional bearing faces are furnished by the shoulder at the upper part of the cutter body, bearing against the lower outer edge of the cutter pocket. The methods of operation are the same.

I am familiar with the North underreamer covered by patent No. 674,793. That reamer consists of a body in two parts, said joints being joined together by threaded portion the same as the Double. In both cases the cutters are actuated by spring carried by a tee or a rod. The North has a solid tee-head to which the cutters are attached. The North cutters have slots in the backs of their shanks in which the tee-heads operate and which are large enough to permit the cutters to tilt. The cutters of the North underreamer contract when drawn downwardly on the spring actuated means and expand when drawn upwardly. The Kellerman underreamer covered by patent No. 679,384 consists of a body with an inter-

(Testimony of William W. Wilson.)

nal bore to receive a spring and a spring actuated rod. The main movement of the cutters of this reamer is not to travel with respect to the body vertically, but were pivoted on a key. The expansion or contraction of the cutters is accomplished by a spring drawing the tapered wedge C-4 up between the cutters or withdrawing it from between the cutters. To withdraw the Kellerman reamer it is necessary to force the spreading wedge downward between the cutters which was done by a device which contracted with the casing as the reamer was drawn into the casing from the lower end.

The Mack underreamer No. 496,317, consists of a body with suitable means of attaching to a string of tools, the body being bifurcated, extending downward in narrow portions which portions are flexible and terminate at their lower ends in cutting parts. These two legs or bifurcated parts or cutters are expanded by [224] means of a spring actuated device interposed between the cutters. The cutters have grooves or pockets at their backs, by which means the cutters are allowed to contract or expand over spreading bearings. In this regard they resemble the Double underreamer cutter.

The Palm Patent No. 563,054 covers the casing spear and has slips that travel on an inclined way, or actuated by a rod with key extending through a slot.

The Mentry underreamer covered by patent No. 647,605 consists of a body composed of two pieces threaded together. Has cutters which operate on



(Testimony of William W. Wilson.)

dovetail slip ways, spring actuated. The cutter ways are downwardly and inwardly inclined, and the cutters collapse on a downward movement or expand when withdrawn upwardly in their dovetail slip ways.

There are many underreamers covered by U. S. Patents, such as the Lloyd Patent, the Hobart & Ahern, Diesch, York, Allen and the Duncan, all of or most of which have cutters which were spring actuated and which were expanded by vertical travel or collapsed by vertical travel in their cutter ways. Many of these had spreading bearings interposed between the cutters corresponding to the Double hollow slotted extension and the cutters were collapsed over the spreading bearing.

My understanding of a slot is an elongated hole in some material. In mechanics, either a long narrow groove or channel, or a comparatively long and narrow depression or cavity, cut in a piece of metal to receive some corresponding part in the mechanism, is known as a slot; also an oblong hole or aperture formed through the entire thickness of a piece of metal is known in mechanics as a slot. I do not consider the opening from one part to another of the Wilson underreamer body between the prongs to be a slot, for the reason that it is open into space. It would be called a notch more particularly. My understanding that the word "slot" implies a hole having four walls—[225] two sides and two ends. If such an opening is opened at one end it becomes a notch.

The purpose of the coacting dovetails on the cut-

(Testimony of William W. Wilson.)

ters of the Wilson reamer and the ways or ribs of the body portion is to limit the outward movement of the cutters; without these the cutters might slip outwardly, allowing them to come off the end of the T-rod. Without these dovetails the Wilson reamer would be operative, but it might not be safe. In some formations it would not be safe, in [226] some it would. I assist in the management of the defendant company, having charge of the offices; also designing apparatus and conducting sales; also overseeing the manufacturing work.

As I stated before in my direct testimony, the cutters of the Wilson underreamer is pivoted on a line which is at the intersection of the plane of the outer faces of the dovetailed ways, and the planes of the bevels formed at the upper end of those dovetailed ways. The object in making the keyseats in the cutters somewhat larger than lugs on the tee-rod is to provide the tilting action for the cutters. In other words, to provide the tilting action for the cutters on the tee.

**Testimony of J. M. Kellerman, for Defendant.**

J. M. KELLERMAN deposes and testifies as follows:

My name is J. M. Kellerman; age, 52; resident of Los Angeles, California. I am an oil operator. I have been in the business thirty-five years in all lines. Have operated in Pennsylvania, Wyoming, Idaho and California. I have operated in practically all of the fields of California. I arrived in California



(Testimony of J. M. Kellerman.)

in 1882 and oil was produced in this State before that time. For ten or twelve years oil was produced in the Pico Canyon prior to that time. Extra heavy casing came into use in about 1902. It was much better for deep drilling. The light casing would stand only about so much water pressure and the heavy casing was much preferred to go deep. The calf wheels would also pull the light casing in two. About 1902 was the first wire line. At that time I used the first wire lines; had used manilla lines before that. Wire lines were much better for deep wells. Calf wheels were first used in about 1900. I had the first calf wheel built that was ever built and I used it on the Santa Susana Ranch for the Union Oil Company. I first suggested the use of the calf wheel. It would be impossible to drill a well [227] in California to-day without the calf wheel or something to take its place. For instance, we would have 4,000 feet of line in and we would have to take it off the bull wheel every time we moved the casing if we were not running our calf wheels, and lots of times would have to move it every thirty minutes, which would simply be impossible. If we were using simply bull wheels and having no calf wheel in the rig, it would simply be impossible to drill in the California fields—we would be doing nothing but putting on and taking off the line. The drilling line is on the bull wheel, and in order to move your casing you would have to run it off that and put on your casing line which is a block and tackle. That is the way we would shift that casing before we had the calf wheels;

(Testimony of J. M. Kellerman.)

consequently we could not drill so deep. My first experience with underreamers in well drilling was that I have seen the time when I would give a thousand dollars for one for five hours. I believe the first reamer that they used in California was the Austrian reamer. That was in about 1898.

We used it at times to knock off lumps or boulders that might stick out in the hole. We didn't use to ream a hole all the way and ream it all like we do to-day; just occasionally we would run it. It did such work. Sometimes it was a pretty hard struggle to get it to do it. We used it on different wells in the Los Angeles field, possibly five or six wells; known other people to use it but can't say how often. I don't believe I have seen an Austrian reamer for ten years. Yes, we lowered the casing after using it; but we might have to try it several times before the casing would go down.

About that time I got up an underreamer myself which worked pretty well, it was about 1900. The reamer was about ten feet long. The jars and the cutters were extended by means of a wedge which operated between the cutters. I had that reamer patented. Patent No. 679,384. I used the reamers on the railroad company's property on Ocean View Avenue, Los Angeles. It worked, but not [228] very satisfactory, but it reamed the hard places and let the casing down. Probably reamed eight or ten wells with it. Reamers I had made in 1901 I ran in the Los Angeles fields—also in Santa Barbara County. Also used them in Newport.



(Testimony of J. M. Kellerman.)

The Union Tool Company made a dozen of those at one time for me; but that special dozen was not what I wanted it, and I changed it. That dozen were just like the drawing in "Defendant's Exhibit Kellerman Patent." Double's company, the Union Oil Tool Company made them on contract. I tried to use one of them, and then remodeled them. Practically wore them out myself, reaming different wells with them at Castaic, King City, Newport and Cat Canyon. After I remodeled them, I considered they worked first class. I remodeled them in 1902, about that time. When the Union made them for me. The trouble with the first reamer I made was getting it out of the hole. The construction of it was bad, I suppose. I don't know what you would call it hardly. It would be the slides that pulled the wedge out would not work satisfactorily; sometimes get stuck and I would have to pull the pipe out of the well in order to get the reamer out. The slip device made by the Union Tool Company was the portion I had remodeled. That was as late as 1910 I used those reamers. I used them for several years for my own work. I was always able to lower casing after using my own reamers. I drilled some holes as deep as 2,900 feet. The only trouble I had with that reamer was getting it out of the casing. The slides or slip device would sometimes get stuck and I would have to pull the pipe to get it out of the hole. I have had the same trouble with Double and Wilson reamers. I have used the Swan underreamers on one occasion, in 1903 or '04, possibly on the Cottage

(Testimony of J. M. Kellerman.)

Home Tract in Los Angeles. It did the work very satisfactorily. It enabled me to lower the casing. But it was a shallow well—you might call it a post-hole—twelve or thirteen hundred feet—but what I had to do, it done the work [229] and enabled us to lower the casing. I never used the Swan or Leidecker reamer except that one time. I couldn't say but what that was the first Swan reamer I ever saw. I have never seen one in the California fields. I have used the Austrian reamers and have been successful in getting off the lump or boulder or whatever it might be and getting the casing down, but it is a long tedious job.

I have seen the Plotts reamer which is very much like the Austrian reamer. I have used both types of Double underreamers. Reamed with the old style and the Double improved. I have also used the Wilson underreamers. I am now using Wilson underreamers. I used about the first Double reamer that was ever turned out on the Dietz Ranch, when their shop was still in Santa Paula. It must have been in about 1902. Possibly 1903. I had good luck with both Double and Wilson reamers. I have lost jaws or cutters off both of them. When I lost Wilson underreamer cutters I do not know whether there was a safety bolt in the Wilson underreamers or not. Determining the relative benefit of different improvement in well-drilling devices will say, that the calf wheel, the underreamer and heavy casing all play an equally important part. It would be impossible to drill wells without either one of them



(Testimony of J. M. Kellerman.)

to-day at the depth we are now drilling. The trip device of the Kellerman underreamer as used to-day is very different from the one I formerly made. I used a trip with a piece of casing, now I trip with a device which contacts with the lower end of the shoe when I draw in the casing. The trip that Mr. Double put in was designed by myself. I have never endeavored to sell any of our underreamers. I am familiar with the O'Donnell and Willard underreamers. During the years 1898, 1899 and 1900 and 1901, there was a strong demand for a successful underreamer.

It was during those times that I saw the time I would have given a thousand dollars for a satisfactory underreamer. It was [230] during any time from 1897 to 1900. I have seen it often. It was before I had used the Austrian.

Q. 199. Then, if I understand you correctly, based upon your experience and knowledge of the Austrian reamer, it at best was merely a makeshift tool to knock off—

A. Shale, lumps, rocks or any interruptions.

Q. 200. You never did any real underreaming, then, with the Austrian reamer?

A. Just as I stated, a bunch might happen to be left on the shell, but I never met any obstructions which it would not knock off and clear the way for the casing.

**Testimony of W. W. Wilson, for Defendant  
(Continued).**

The strength of the Wilson cutter is improved or greatly increased by reason of the opening or open notch-way in which the shanks of the cutters extend. It facilitates ease of machining the Wilson underreamer body. Open spaces for cutters are old. In my opinion the Wilson underreamer could be made with the cutters operative and leave solid metal the entire circumference of the body at the lower end. Such an underreamer could be designed eliminating the spreading bearing for the cutter as shown in the Willard underreamer, the Swan underreamer and also in the Double underreamer. The cutter would have a pivoting action instead of a teetering action as in those other reamers.

In the Wilson reamer there are spreading surfaces on the lower ends of the prongs. The bits co-act with these inclined surfaces and the upward movement of these bits on these inclined surfaces swing or tilt or cause pivotal action, whichever you wish to term it, of the cutters on the spring actuated rod. After the bits have passed beyond these inclined surfaces, which may be termed "spreading surfaces," the same portions of the bits ride up on further spreading bearings. The primary function of these further spreading bearings is to take the in-thrust of the bits when underreaming. The body portion of the Wilson reamer is sufficient [231] to allow room for the spring and the spring-actuated rod. The shoulders or spreading surfaces of



(Testimony of W. W. Wilson.)

the bits are projected along the faces at the outer edges of the sidewise extension of the cutters. These faces are turned in toward the center of the body but are not the innermost faces of the cutters. There is no other contacting face of the cutter which is further in than these shoulders or surfaces to which we have last referred except the upper end of the shank which bears against the block or T-bar when the cutters are in expanded position, maintaining the upper ends of the cutter shanks in proper position and directing the motion of the cutter in expanding. The upper ends of the shanks of the bits in the Wilson reamers bear outwardly against the dovetails or ribs, and inwardly against the block (in Complainants' Exhibit Wilson Reamer) or T-bar (in Complainants' Exhibit Wilson Underreamer No. 2) according to the strain that may be on the cutters when in action, or strain put on the cutters in collapsing or expanding. The upper ends of the shanks of the cutters do not necessarily bear against the dovetails or shoulders, or the block or T-bar. There is lost motion there to prevent binding. There is only very slight movement of the upper ends of the shanks away from their bearing on the block or T-bar during the callapsion of the bits. The main movement is down along the block. There is some movement of the upper end of the shank outward or T-head. The point above the pivot moves slightly outward. That is a mere incident in the action of the Wilson cutter. The shoulders or spreading surfaces of the Wilson cutters face toward the inner side of the cut-

(Testimony of W. W. Wilson.)

ter. They are the inner faces, recessed faces. When I said that these faces were not projected toward the inside of the cutter I mean that they are on a shoulder or projection from the inner face of the cutter, as is the riding surfaces of the Double underreamer.

Q. 194. Why do you say that these surfaces are not projected inwardly?

A. Because, considering the body of the metal in which these [232] shoulders are placed, they are in the actual machine operations cut from the metal which extends further in, and lie on either side and outward from the central portion of the cutter at that point.

Q. 195. Now, Mr. Wilson, let us change your viewpoint then and consider the Wilson cutters not from their mode of manufacture, but the cutters as they actually exist in the Wilson reamers and are here before us. Will you still say that these spreading-shoulders and surfaces are not projected inwardly?

A. I can see no inward projection on which they rest.

Q. 196. What purposes do the surfaces 4<sup>3</sup> of the Wilson underreamer, referring to "Defendant's Exhibit Wilson Patent 827,595," subserve?

A. They are for the cutters to bear against to retain them in outward expanded position when the cutters are expanded.

Q. 197. And the shoulder at the top of these surfaces 4<sup>3</sup> cause the tilting or pivotal action of the cutters, do they not?



(Testimony of W. W. Wilson.)

A. The upper edge of that shoulder causes expansion.

Q. 198. The upper and inner edge? Is that correct?

A. The surfaces 4<sup>3</sup>. It is only the upper. It could not be the inner.

Q. 199. Well, it is the inner portion of this shoulder, which shoulder is above the surfaces 4<sup>3</sup> that causes the tilting action of the Wilson cutters, is it not? A. Yes, sir.

Q. 200. Referring now to "Complainants' Exhibit Double Patent," what purposes do the surfaces, 18, on the bits serve?

A. So they can take the inner thrust of the cutters at the lower end when reaming.

Q. 201. And what do the shoulders 26 do?

A. They allow space for the cutter to collapse over the partition or extension 6.

Q. 202. Is that their primary purpose? (Referring to faces 26 of [233] the Double patent.)

A. Yes, sir. Without that face there could be no pocket, and, consequently, no collapsible action of the cutter.

In the Wilson reamer the shanks of the bits are rigidly held throughout their length when the bits are in expanded position, as set forth in lines 71-72, of column 2, of page 2, "Defendants' Exhibit Wilson Patent," being in contact throughout the length of the cutter shank with the ridges or dovetail on the inner faces of the prongs. The pressure of the upper spreading bearings on the lower ends of the

(Testimony of W. W. Wilson.)

prongs against the coacting faces on the cutter and also the block or T-head at the top against the upper ends of the cutter, hold these cutters in such rigid contact or interengagement with these dovetails.

The lugs or projections at the lower ends of the prongs of the Wilson underreamer bodies are provided with two faces, that is, each face upon which the cutters rest when expanding or when in reaming position are spreading faces as they are angular and tapered. This differs from the Double as with the Double underreamer it has only one spreading face for each cutter, the inner thrust bearing being parallel is in no wise an expansion bearing. While the bearings at the backs of the Wilson underreamer cutters are in a sense inner faces, their position is different from the Double underreamer cutters as they are not the innermost face of the backs of the Wilson cutters. That is the case, however, with the Double underreamer cutters. The shoulders at the back of the Wilson underreamer cutters are not projected shoulders as is the case with the Double underreamer. They are recesses in the backs of the cutters and do not extend even as far as the back edges of the cutters and cannot be called a projecting shoulder as is the case with the Double reamer cutter.

The retaining bolt or safety bolt of the Wilson underreamer is solely for the purpose of preventing loss of Wilson underreamer cutters. The pipe placed over the tee-rod of the Wilson Underreamer Complainant's Exhibit, is for the purpose of [234]



(Testimony of W. W. Wilson.)

limiting the downward travel of the cutters when collapsing. Such a device could not be used on the Double underreamer as there is not room enough to do so; it would be necessary to drill a larger hole to admit the pipe and the spring. This would weaken the middle joint still more than the present condition.

The metal in the central partition between the portion upon which the upper face of the Double bits bear when in expanded position, and the thrust bearing below the dovetails of the body, in the Double reamers serves the purpose of directing the rod at its lower end; it also serves to keep the cutter shanks from tilting inwardly at any stage of the contraction or expansion; and further, the old idea of preventing the sand in the well from interfering with the action of the reamer requires all space to be filled as much as possible with metal. Cutting out this metal from the Double reamer might interfere with the action of the reamer. I am not certain; I am not clearly posted on the Double reamer. It would not change the mode of operation of the inter-related parts in any manner to remove the metal referred to unless it might allow other actions of the cutters to come into play; the cutter might tilt in at that point; also, the mandrel would be liable to become displaced so as not to properly enter the hole in the lower portion of the metal. Cutting out this portion of the metal would not render the Double reamer inoperative. However, it would be liable to more objections than it now has by this action.

(Testimony of W. W. Wilson.)

This differs from the open chamber of the Wilson.

Q. 245. In what respect would it be different in that regard than the open chamber for the rod in the Wilson reamer?

A. The Wilson T-bar, being integral at its lower end, has no need of an extension of the mandrel-rod below the key, as is in the Double reamer; and, further, the peculiar tilting of the cutters that is necessary in the Double underreamer may cause actions that would not come into play in the Wilson underreamer. It is necessary in the Double underreamer that the cutters be allowed to [235] play outward and inward on the T-rod, and this action is particularly noted when the cutters are running up and down the casing, at which point the metal which might be removed as shown in the complainants' attorney's questions, comes into play to maintain the cutters, the shanks, in their outward expanded position, which if removed, might allow them to tilt outwards on running down the casing, causing them to stick.

The Austrian underreamer body has slots machined through it in which the cutters or bits are mounted. Each bit is mounted on a pin which passes through a hole in the body, and through a hole in the bit. The upper horizontal faces of the bits when in expanded position contact with shoulders at the top of the pockets in which the bits are mounted.

The only difference between that and the Wilson underreamer is that the cutters swing through a



(Testimony of W. W. Wilson.)

larger angle to expanded position than with the Wilson.

The mode of operation of the bits in the Austrian reamer and the Wilson reamer are dissimilar, however, the means of protecting them are virtually the same. There is no longitudinal movement of the dogs or bits of the Austrian reamer in the body of the Austrian reamer. Their action is solely pivotal. In the Wilson reamer, the actions are similar in that both are pivotal. The bits also have a longitudinal movement in the body. The amount of longitudinal or sliding movement of the Wilson cutters or bits depends upon the length and angle of the spreading bearings.

Q. 267. And in this respect the Double and Wilson underreamers both differ from the Austrian?

A. In this respect the Wilson reamer differs from the Austrian. However, the Double underreamer differs from the Austrian in having this action combined with the tapered dovetail-ways action to give additional expansion.

Q. 268. Explain what you mean in your last answer by tapered [236] dovetail-way action of the Double reamer.

A. The dovetail ways of the Double reamer body, as I have explained, taper inwardly at their upper ends, so that the cutter dovetails on traveling upward cause the upper end of the cutters to be drawn together, which acting over the fulcrum, at the center of the cutter, causes the cutting edges to be thrown further outward.

(Testimony of W. W. Wilson.)

Q. 269. At what point in the Double underreamer, either "Complainants' Exhibit Double Underreamer" or "Defendant's Exhibit Double Underreamer," or in the drawing of "Complainants' Exhibit Double Patent," do the dovetails on Double bits contact with the dovetails for the action that you have last referred to?

A. Throughout their travel up and down.

Q. 270. The whole length of the dovetails?

A. No, the upper ends of the dovetail ways on the cutters bear against the insides of the dovetail ways—or, against the outsides of the dovetail ways, rather—throughout the travel of the cutter.

Q. 271. And do not the upper ends of the dovetails on the cutters of the Wilson reamer similarly bear against the dovetails on the body of the reamer?

A. They do. However, the dovetails on the Wilson body or ridges being parallel, this can give no additional expansion.

Q. 281. In your answer to question 15, in speaking of the strain taking place on one side of the cutter, due to one edge of the cutter only striking upon a ledge in underreaming, you say that the blow would come on one point at one side of the cutter and on the diametrically opposite point of the other cutter. Where is this strain thrown onto the body of the reamer?

A. In which underreamer?

Q. 282. In the Double reamer, first.

A. The pressure is primarily up and also diametrically inward [237] on this point of the cut-



(Testimony of W. W. Wilson.)

ter. That throws a strain on the outer edge on the same side of the cutter of the spreading bearing on the body; also an outward pressure on the upper ends of the dovetails of the body; also an upward pressure of the cutter against the upper thrust-bearing of the body, as shown in the case of the "Complainants' Exhibit Double Underreamer." In the "Defendant's Exhibit Double Underreamer," to begin with, it is noted that by putting a straight edge on the inner-bearing face of either of the cutters, that that face has become rounded. In this underreamer, when such a strain is applied to the point of the cutter, similar stress is thrown on the cutter upward and diametrically inward, the upward stresses causing pressure of the cutter-shank against the upper thrust-bearing upon the body, the diametrically inward pressure causing pressure inward on the thrust-bearing at the lower end of the partition of the body and outward stress of the cutter dovetails against the dovetails of the body on the side opposite from the cutter to the point where the pressure is applied.

Q. 283. And the tendency, then, of such a blow in the underreaming is to rip the cutter out sideways of the body of the reamer, is it not?

A. Yes, sir.

Q. 284. And this tendency is resisted by the wall of the slot or notch?

A. No, the pressure is taken up by pressure inward against the thrust-bearing on the lower end of the partition, and, like a lever action, the other part

(Testimony of W. W. Wilson.)

of it is taken against outward pressure on the dovetails of the body at the other side.

Q. 285. The tendency is to rip out the dovetails, then, in this action? A. Yes, sir.

Q. 286. And the dovetailing is a brace against this tendency? A. Yes, sir. [238]

Q. 287. In a similar strain upon the Wilson reamer, the same tendency is counteracted by the dovetails, is it not?

A. No, the spreading-bearings being placed out under the extreme edges of the cutter, any diametral-thrust pressure on the corner of the cutter would cause pressure inward on that upper spreading face on the prong, which is reacted against by the pressure outward of the cutter-shank against the dovetails clear up the body—clear up the length of the cutter.

Q. 288. And the tendency is to rip out the dovetails, is it not?

A. No, that is the advantage of having the spreading-bearings wide apart on the edges, because this prevents throwing a heavy strain on the dovetails at the body at the lower portion.

Q. 289. You mean to say that there is no tendency in that action of the shank of the cutter to move outward, which tendency is counteracted by the dovetails?

A. Yes, there is a tendency of the cutter-shank to move outward. However, this action tends to move the entire cutter-shank outward.

Q. 290. And that tendency is counteracted by the dovetails?



(Testimony of W. W. Wilson.)

A. Dovetail in full length of the cutter-shank. Also the strain on the cutter-shank is much further away from the fulcrum on the spreading-bearing than the point of application of the pressure to the cutter is from the fulcrum; consequently, it has great leverage.

The Wilson underreamer cutters, being at the extreme outer edges of the body, by coacting with the extended bearings on the prongs of the underreamer are better braced, and thus less strain is applied to the dovetails, than is the case with the Double underreamer.

A. 294. I cannot see but mechanically there are two separate thrust-bearings acting on each cutter in the Wilson reamer, and in the Double reamer, particularly in "Defendant's Exhibit Double Underreamer" there is one thrust-bearing acting upon each cutter. [239] It is as though I placed a board resting on two tables, each placed at its end; or, if I rest the board on one table, the table placed at its middle.

Q. 295. You understand both the purpose and object of the question that I just asked you, and the suggested change in size of the parts, do you not?

A. Yes, sir, I think I do.

Q. 296. Well, will you please answer the question?

A. If the two bearings, one operating on each cutter, which are on each prong, were placed closer together, the strains on the cutter would be the same as they are at present constructed. The advantage in cutter action is gained by placing the two spread-

(Testimony of W. W. Wilson.)

ing surfaces, which act on one cutter, far apart, rather than centrally locating with respect to the back of the cutter.

Q. 297. What, then, do you understand to be the reason for using the open slot and the dovetails for the shanks of the cutters in the Wilson reamer?

A. I take it you mean the forked lower extension of the Wilson body. As previously stated, it is for the purpose of placing the thrust-bearings against the cutters wide apart on the cutter-backs as well as allowing room for the cutters to operate, so that they may collapse completely together without having any portion of the body interpose between them, therefore requiring no arrangement of the inner faces of the cutters, such as a notch or cut-out space in the backs to allow for contraction. Also, it allows the entire operating mechanism to be placed or withdrawn from the underreamer body through the lower end, thus avoiding the middle joint. Also it allows the underreamer body, when worn, to be machined back a distance to cut the old bottom bolt holes out of the body; and in this manner give entire new wearing surfaces to the action of the reamer; this being particularly shown in "Complainants' Exhibit Wilson Underreamer," where the reamer has been remachined, the bottom bolt hole having been cut off. The [240] groove above that hole for the placement of the cutter-pin alone remaining on one end of one prong. The old screw-holes were plugged up, as shown just below the new and present used screw holes. So the reamer body is reclaimed in a way



(Testimony of W. W. Wilson.)

that is as good as new. This cannot be done with the Double underreamer, because it would have to be machined back sufficient distance to allow the placing of the lower portion of the body extending below the bottom of the slot, a sufficient distance above the top of that slot to give these new wearing surfaces as before, and this would carry the pockets for the cutters to slide in up above the counter-bored portion of the underreamer body, and consequently weaken these parts; also new means would have to be devised to support the spring, or longer spring used.

Q. 298. I will ask the Special Examiner to read the question to the witness and ask the witness to answer the question. (Question No. 297 read.)

A. I am trying to answer the question as I understand it.

Q. 299. In the operation of the Wilson underreamer as an underreamer, what, then, is the reason for using the inner engaging dovetails of the body portion and bits?

A. The reason for using the dovetails on the bits and the co-acting shoulders on the extension of the body, is for the purpose of preventing outward movement of the cutter-shanks beyond certain limits.

Q. 300. When is there any tendency towards such outer movement?

A. I have shown a tendency towards an outer movement in the previous answer, wherein a blow should be struck at one corner; also in the brittle formations, where the rock being underreamed

(Testimony of W. W. Wilson.)

breaks off, leaving the shell or ridge between the drilled hole and the underreamed hole, forms in an upwardly expanding funnel shape, there is a constant tendency to draw the lower points of the cutters inward, which throws an outward strain [241] on the upper shank of the cutters, which is held by the ridges on the inner sides of the forks of the extension.

The object of the forked lower extension of the Wilson underreamer body is to provide these wide bearings and also to permit the cutters to collapse completely together without having any portion of the body interposed between them, thus dispensing with the use of the notch found in the Double underreamer cutter which weakens the Double reamer cutter, and it also avoids the necessity for the middle joint in the reamer body, as the cutters and reamer are assembled at the bottom.

Q. 301. Referring now to "Defendant's Exhibit Swan Patent 683,352," do you consider the mode of operation in said Swan patent of the parts in contraction or collapsion of the cutters or bits the same as either the mode of operation of the Double reamer of "Complainants' Exhibit Double Patent" or of the Wilson reamer of either of the complainants' exhibits?

A. I believe I have stated in my answer to the comparison of the Swan underreamer and the Double underreamer, that the action of the contracting the cutters of the Swan patent by sliding down inwardly inclined dovetails, had a counterpart in the



(Testimony of W. W. Wilson.)

Double underreamer as disclosed in the patent and the exhibits, in the outwardly tapering dovetail ways shown in those underreamers and patents, in that the cutter on sliding along tapered dovetail ways caused contraction. In the Double underreamer, the taper of the dovetails is reversed from that of the Swan, due to the fact that the action of the dovetail of the tapered dovetail ways of the Double underreamer is applied to a point on the cutter which is on the opposite side of a fulcrum about which swings the cutter, which fulcrum action reverses the direction which the dovetails must be tapered. In the Swan, however, no such fulcrum being present, the dovetail ways acting directly on the points of the cutters, the dovetail ways are tapered inwardly and downwardly, which is the reverse of [242] the tapering of the dovetail ways in the Double underreamer patent and in the Double underreamer, "Complainants' Exhibit Double Underreamer" and "Defendant's Exhibit Double Underreamer."

Q. 302. Then are we to understand from your last answer that you consider the mode of operation of the Double cutters in expanding and contracting the same as the mode of operation set forth in said Swan patent?

A. Not altogether the same, the Double underreamer cutters having also expanding action by being slid over stationary spreading-means on the lower end of the extension in the expanding.

Q. 303. Would the Double bits expand in any manner if it were not for the spreading surfaces of

(Testimony of W. W. Wilson.)

the bits riding on the inclined surfaces of the expansion-bearings of the Double reamer?

A. Yes, if the expanding-bearing was taken clear out from the Double underreamer, leaving only the dovetails, the cutters could be collapsed so that their backs rested against each other and then sliding upward, the shanks of the cutters riding in tapered dovetail ways, would cause expansion of the points of the cutters, which lie below the points where the cutters would bear together.

Q. 304. For that reason, you say that the mode of operation or of expansion of the device of the said Swan patent, and of the Double underreamer, are practically the same, do you?

A. In that one respect they are practically the same.

Q. 305. You disregard, then, the fact that the Double underreamer cutters have a tilting action and no tilting whatever is possible of the Swan cutters, do you?

A. No, I believe I have stated that that tilting action is an additional action in the Double cutters, and the expansion is due to, (a) a tilting action of the cutters over the spreading-bearing, and, (b) to the incline of the tapered dovetail ways.

Q. 306. Do you consider the mode of operation of the device set [243] forth in "Defendant's Exhibit North Patent 674,793," the same as the mode of operation of the Double reamer of "Complainants' Exhibit Double Reamer"?

A. The expansion of the North underreamer is



(Testimony of W. W. Wilson.)

caused by drawing the upper ends of the cutters together by sliding in upwardly in the tapered cutter pocket, the cutters being fulcrumed against each other near their center, causing the cutting edges to be thrown outward. This same action I have described in the Double underreamer as being due to the tapered dovetail ways in the body, in my answer to your question on the Swan underreamer.

Q. 307. Will you now please answer the question just asked yes or no?

A. Read the question. (Question No. 306 read.) No, not identically the same.

Q. 308. That is, are they substantially the same?

A. No, only partially.

Q. 309. Do you consider the mode of operation of the expansion and contraction of the bits in "Defendant's Exhibit Kellerman Patent 679,384," the same or substantially the same as the mode of operation in the contracting and expanding the bits in "Complainants' Exhibit Double Patent" or Double underreamer?

A. Substantially the same, yes, sir.

Q. 313. (By Mr. BLAKESLEE.) Well, then, to bring it right down to the facts, or to establish what we still contend are the true facts, let us refer, first, to the "Complainants' Exhibit Double Patent" in suit, and I will ask you how the spreading action would be produced with the construction shown in this patent, if the "downward extension 6" were removed.

A. The expansion of the cutters would be only

(Testimony of W. W. Wilson.)

small, due to their travel in the tapered dovetail ways.

Q. 314. Again, supposing such elimination of metal, please state what contribution to the spreading-action of the cutters would be [244] made by the faces, 26, of the cutters and the shoulders between the faces, 26, of the cutters, and the projections, 18, of the cutters.

A. There would be no expansion caused by these parts.

**Testimony of Edward L. Mills, for Defendant.**

EDWARD L. MILLS deposes and testifies as follows:

My name is Edward L. Mills; occupation, proprietor of the Mills Iron Works; residence, Los Angeles, California; age, 44. I am a manufacturer of oil well tools. I have been in that business since the year 1888. I have manufactured underreamers. The first underreamers I manufactured were the Austrian underreamers. That was in about 1896. That was in Bradford, Pennsylvania. It was in the shop of the Bovard and Sefang Manufacturing Company. I don't suppose I made half a dozen. Also made about half a dozen of Russian underreamers at the same place. It was a foreign shipment.

While with the Baker Iron Works of this City that Company made Austrian underreamers, also made some underreamers for a man by the name of Swan. That was from 1900 to 1902. I presume we made twenty-five or thirty Austrian underreamers. A good many of them were sold. I have heard of



(Testimony of Edward L. Mills.)

the Wilson reamer, and also the Double reamer and am familiar with both. Saw Double reamer in probably the year 1900 when I first came to Los Angeles. The first ones were the type, "Defendant's Exhibit Double Reamer." I believe the Wilson underreamer is the stronger reamer of the two. The cutters of the Wilson underreamer are stronger because the stock in the center of the cutter is not all removed to allow the cutter, to close down over the end of the reamer.

A. 64. Well, in the Wilson—the shank on the Wilson cutter is not provided with any pocket to allow the cutter to close down over the mandrel. That stock being left in that cutter makes the cutter [245] very much stronger than the Double underreamer cutter, which is cut away to allow the cutters to contract down over the spreading-bar of the underreamer.

Q. 65. Will you kindly point out the pocket to which you have just referred?

A. This pocket right here. (Witness designates in a cutter of Defendant's Exhibit Double Underreamer the space directly above and formed by the production of the face 26 of Complainants' Exhibit Double Patent.)

Also the bar that holds the cutters is stronger. The Wilson underreamer will in my opinion last longer than the Double because the spreading bars at the end of the reamer are made tapered so that the cutters will relieve themselves in case of getting stuck in the hole or formation in which the reamer

(Testimony of Edward L. Mills.)

is being used. The Double cutters are slotted entirely through to permit the key, while the Wilson reamer cutters are machined only part way through. With the solid forged tee-bolt of the Wilson reamer in the event one lug would break off only one cutter could be lost, whereas in the Double both cutters would be lost. I have seen Double underreamer cutters broken through the shanks. By examining this broken Double reamer cutter I cannot tell in any way whether it has ever been tempered. It may have been tempered and may have been annealed a dozen times, for all I know.

A. 90. From the appearance of the metal in the broken cutter it does not show any evidence of containing any flaws or inherent defects.

Q. 91. (By Mr. BLAKESLEE.) Now, assuming that this piece of cutter shank-like metal had been tempered just last prior to its breakage, will you please state whether, so far as you are informed about such matters, such tempering would be evident now subject to the test you have made.

Mr. LYON.—Same objection as last noted. [246]

A. I think that if the broken piece of cutter or the cutter from which that came, had been tempered, it would certainly show evidence of being tempered.

Q. 92. (By Mr. BLAKESLEE.) During your experience in Los Angeles have you ever repaired any Double underreamers or parts thereof?

A. Yes, sir.

Q. 93. In what respects among others?

A. I have repaired the body of the underreamer



(Testimony of Edward L. Mills.)

in use at the end or spreading portion, which becomes worn, from the cutter sliding up and down, and usually plane them off and set pieces on the end.

Q. 94. Any other respects?

A. I made new spring-bolts for them, repaired the springs, made new keys in a number of instances.

Q. 95. Have you ever done anything on the cutters of the Double underreamer during that time?

A. Only dressing them; dressing them and repairing them.

Q. 96. Repairing them in what respect?

A. Well, sometimes in running the reamer the cutters will bend through that weak portion where the pocket is planed in; have to be straightened up.

Q. 97. Please point out the portion you refer to on the cutter of "Defendant's Exhibit Double Cutter."

A. Bend through; either bend or break. (Witness refers to the portion of the shank just above the face corresponding to the face 26 of "Complainants' Exhibit Double Patent.")

I have never repaired a Wilson underreamer. I have never seen a broken Wilson cutter. I arrived in Los Angeles I think the fall of 1900. Went to work at the Baker Iron Works at once. I think it was about November 1st. Worked for them about a year and six months.

I have absolutely no animosity against Edward Double or the Union Tool Company. He and I are very good friends so far as [247] I am concerned.

I have no animosity against Mr. Lyon. At first I

(Testimony of Edward L. Mills.)

thought Edward Double in bringing me into that Interference case was trying to do me an injury—however, I think it was a benefit to me the way it turned out.

A general description of the Swan underreamer, or rather an underreamer made for the man by the name of Swan while at the Baker Iron Works in this City; the body contained a pin at the top and a sharpened projection at the bottom end to serve as a bit and a slot in the body of the reamer to receive the cutters.

There was a pin fastened through the cutters to hold them in the body of the reamer. The cutters were held apart by a spreading block contained at the lower portion of the reamer body. The reamer was covered by Patent No. 683,352 was not the same make or style. At one time I manufactured reamers known as the “Mills” or “National” reamers. That reamer used a tee-rod which was spring-actuated and which carried the bit and the head or wings or key of the rods were made integral with the ends of the rods and that rod was slipped into the reamer from the bottom. I used the open slotted sides of the lower extension of the mandrel for the backs of the cutters to project through. It had no interengaging dovetails on the walls of the slots and cutters. That reamer had no integral partition extending from the top of the side slots and between the side slots clear down to the end of the reamer. The bore was an open chamber at that point.

Q. 147. In the reamer as manufactured by you



(Testimony of Edward L. Mills.)

there was no integral partition extending from the top of these side slots and between the side slots clear down to the end of the reamer?     A. No.

Q. 148. The bore was an open chamber at that point?

A. Yes, an open chamber with the exception of the space at the bottom of the body of the reamer that the spreading block was inserted and fastened in. [248]

Q. 149. And in order to form the spreading block you screwed that spreading block onto the end of the slotted body and used the screw threads and pins to hold the block in place?

A. No, sir. That spreading block was inserted in the bottom of the reamer, and there was a hole drilled through it in the sides of the reamer to insert a pin; no screw threads about it.

The spreading surfaces were substantially the same as "Complainants' Exhibit Double Reamer."

The action of the cutters in tilting was the same as "Complainant's Exhibit Double Reamer" and "Complainant's Exhibit Wilson Reamer," that spreading action being essentially the same in all these reamers. Those reamers did satisfactory work, were apparently satisfactory. I never got any of them back. There was an interference suit filed by Mr. Double in regard to my application for a patent on that reamer.

The Double patent 796,197 dated Aug. 1, 1905, issued on an application filed Dec. 18, 1902, shows the drawings, specifications and claims on the Double application involved in the interference in the Patent

(Testimony of Edward L. Mills.)

Office with the patent application of this witness on the underreamer referred to by him as the Mills or National underreamer. Said reamer was adjudged by this Court to be an infringement of the Double patent 796,197 offered in evidence.

**Testimony of E. C. Wilson, for Defendant  
(Recalled).**

Direct Examination Resumed.

I will explain that the "Defendant's Exhibit Broken Cutter Shank Parts," was brought to the shop of the Wilson-Willard Mfg. Company by two men engaged in the oil business. One of them produced this piece of broken cutter and said that they were looking for an underreamer that does not cause the trouble as this caused us. That was the manner in which I got possession [249] of this piece of cutter. It is the upper shank or portion of shank of the Double underreamer cutter, Complainants' Exhibit Double Reamer.

Such broken pieces of Double cutters are common sights in the oil field shops. (599) W. W. Wilson brought in to our shop the lower half of the Double underreamer body with both of the cutters broken in two at the slot. That was two or three weeks ago. (600)

Mr. LYON.—We object to the answer so far given by this witness, and particularly the alleged conversation, as being incompetent, hearsay; not the best evidence; it not being shown to have taken place in connection with complainants or any of their



(Testimony of E. C. Wilson.)

officers; and move to strike the answer from the record and exclude it from consideration upon the grounds stated; and object to the witness further detailing any of such conversation on the same grounds; and protest against the lumbering of the record with such incompetent and hearsay matter. If the witness has any personal knowledge of this particular piece of metal other than that he got it from two oil men, I would be pleased to know it.

Mr. BLAKESLEE.—It is believed proper for the witness to state completely the circumstances attending his coming into possession of this piece of metal, although the particular conversations concerned in such circumstance, it is admitted, are not as to themselves necessary evidence.

**Testimony of Edward North, for Defendant.**

Mr. North deposes and states that his name is Edward North, age 52 years, occupation—accountant. Residence, Los Angeles, California. I have had several years' experience in oil well tools, as far back as 1889. I have watched the oil [250] well production since the year of 1888. The first underreamer I saw was an Austrian reamer. It was in Los Angeles in the year 1897 or 1898. I did not see that underreamer used, nor did I use it. All I know of it was from common reports. I think I had never seen any other kind of an underreamer prior to 1899. In 1900 I rented a Swan underreamer made by the Leidecker Brothers. In Marietta, Ohio. I rented that reamer from McCrea Brothers. I just simply

(Testimony of Edward North.)

kept it in the derrick, expecting to have a chance to use it, but did not have an opportunity to use it. The casing got stuck before I was able to use it, and froze fast, and it is in there still. I could not lift up the casing far enough to use an underreamer. My next experience was one of my own invention in the summer of 1901. I tried that reamer on the Polo Solo well at Whittier. I forget the exact amount I reamed but it did the job all I needed. I patented that invention. Number of patent 674,793.

A. 24. Practically the only difference was the use of a second trip, one on the other side. This (the patent) provided for only one trip, and I found that it did not work satisfactorily on account [251] of crowding the spring-rod over against the opposite side from the trip, and I put in a trip on the other side; that was practically the only difference in it. I dispensed with that spring here in the upper part of the mandrel, as they call it, because I did not need it. That was practically the only change in it. I rented that reamer to several parties. Dave Connell used it, also a man by the name of Beck on the Silver City Petroleum Company, he used it quite a while. They paid me for the use of the reamer. I made several 5-5/8", some 7-5/8" and 9-5/8" and a 7" one, possibly two 7" reamers. They were made in between the fall of 1901 and the summer of 1902. Some of them were sold. Some were sold to the Mexican Petroleum Company, some to the Santa Fe Railway Company. The Llewellyn Brothers had a royalty contract with me.



(Testimony of Edward North.)

Q. 35. What, if any, further underreamers of this kind did you thereafter make?

A. I can't say absolutely. I have some memoranda here, if you will permit me to refresh my memory—I looked over some old books of mine the other day. Well, I mentioned the one I sold to Herron. Llewellyn Brothers had a royalty contract with me and they paid me royalties on some reamers; I don't know what they were. One of them, I believe, was the one that was shipped to the Mexican Petroleum Company. The Santa Fe Railroad Company—I mentioned that before—and I shipped one to a man in either Kansas or Indian Territory, I cannot remember now which.

Later I went into partnership with Mr. Edward Double, of the Union Tool Company, and we made some improvements on the reamer and got out a good many circulars on the subject, but I assume that he never sold any of those reamers for the reason that I never received any royalty from them. That contract was on the 11th day of October, 1904. We made a license agreement with the Union Tool [252] Company to manufacture these reamers. That agreement was as follows:

#### AGREEMENT.

This memorandum of agreement made and entered into this 11th day of October, 1904, by and between Edward North, hereinafter referred to as the first party, and Edward Double, hereinafter referred to as the second party, both of Los Angeles, County of Los Angeles, State of California, WITNESSETH:

THAT WHEREAS, the said Edward North has, heretofore invented certain improvements in underreamers for which letters patent No. 674,793 dated May 21, 1901, were granted to him; and

WHEREAS, the parties hereto are desirous of pushing the manufacture and sale of underreamers embodying and containing the said patent or patentable improvements, or constructions covered by said letters patent;

NOW, THEREFORE, SAID PARTIES HAVE AND DO HEREBY AGREE TOGETHER AS FOLLOWS:

1. For and in consideration of the hereinafter contained promises, covenants and agreements, on the part of the second party and the full and faithful performance of each and every part thereof, said first party does hereby sell, assign, transfer and set over unto the second party, his heirs, legal representatives and assigns, an undivided one-half in and to said letters patent and the invention covered thereby, the same to be held and enjoyed by said second party, his heirs and assigns as fully and entirely as the same might or could have been held by said first party, had this assignment not been made.

In consideration of the foregoing assignment, the second party hereto agrees to use his influence to secure a license contract with the Union Oil Tool Company for the manufacture and sale of underreamers, embodying the constructions covered by said letters patent and also to secure the manufacture and sale of [253] underreamers embody-



ing constructions covered by said letters patent, by other companies in other parts of the United States, to cause the sale and manufacture of said underreamers to be pushed and a market demand thereof supplied, not only in the State of California, but elsewhere in the United States of America.

2. IT IS MUTUALLY AGREED AND UNDERSTOOD BY AND BETWEEN THE PARTIES HERETO that they shall share equally in all benefits and advantages which may accrue from said letters patent, and shall divide equally all royalty, and all royalty contracts, and that the parties hereto shall both use their utmost endeavor to make said patent profitable and to push the manufacture and sale of said underreamers.

IN TESTIMONY WHEREOF, WITNESSETH the hand and seal of the parties hereto, the day and year first above written.

Signed EDWARD NORTH. (Seal)

Signed EDWARD DOUBLE. (Seal)

In the presence of:

#### LICENSE CONTRACT.

THIS MEMORANDUM OF AGREEMENT, made and entered into this 11th day of October, 1904, by and between EDWARD NORTH and EDWARD DOUBLE, hereinafter referred to as first parties, both of Los Angeles, County of Los Angeles, State of California, and UNION OIL TOOL COMPANY, a corporation organized and existing under the laws of the State of California, and having its principal

place of business at Los Angeles, and hereinafter referred to as the second party, WITNESSETH:

That whereas said first parties are owners of the full and exclusive right, title and interest to letters patent of the United States, No. 674,793, dated May 21, 1901, for UNDERREAMERS, and whereas the second party is desirous of securing a right to manufacture and use, and sell to others to be used, underreamers embodying the constructions covered by said letters patent: [254]

NOW, THEREFORE, said parties do hereby agree together as follows, to wit: For and in consideration of the hereinafter contained promises, covenants and agreements on the part of the second party and of the full and faithful performance of each and every thereof, the first parties hereby license, authorize and empower the said second party to manufacture and use and sell to others to be used, underreamers embodying and containing the constructions covered by said letters patent to the full end of the term for which said letters patent have been granted or may hereafter be extended.

FOR and in consideration thereof, the said party hereby agrees to pay to the first parties the sum of FIFTY DOLLARS (\$50) as royalty on each underreamer manufactured and sold by it embodying and containing the construction or constructions covered or secured by said letters patent; that it will render written statements monthly (on or before the tenth of each calendar month) to the said first parties, showing truly the number of underreamers manu-



factured and sold by it under this license agreement during the preceding calendar month, embodying and containing the construction or constructions covered by said letters patent; said statement in writing to be verified by oath of an officer of said second party, if so required by said first parties or either of them.

Said second party further agrees that it will pay to the first parties on or before the tenth day of each calendar month, the royalty for all underreamers sold by it under this license agreement during the preceding calendar month, and said second party agrees that it will keep full, true and accurate books and records of all underreamers manufactured and sold under this license agreement, which said books and records shall be open at all times to the inspection of each of said first parties or their duly authorized agents.

It is mutually covenanted and agreed by and between the parties [255] hereto that, in event of it becoming necessary to bring suit on said Letters Patent to protect the same from infringement, that if said second party hereto desires to bring such suit it may bring such suit in the name of the first parties, but, at the cost and expense of the second party, and that it will save the first parties harmless from all costs and expenses incurred in such suit or chargeable against said first party, by reason of any judgment in such suit against said first parties.

IN TESTIMONY WHEREOF, said first parties have hereunto set their hands and seals, and the

(Testimony of Edward North.)

second party has caused these presents to be executed in its name by its Vice-President, attested to by its Secretary, and the corporate seal hereto attached, the day and year first above written.

EDWARD NORTH. (Seal)

EDWARD DOUBLE. (Seal)

In presence of:

\_\_\_\_\_.

\_\_\_\_\_.

UNION TOOL COMPANY,  
By EDWARD DOUBLE,  
Its Vice-President.

Attest: DANIEL J. KOENIGSTEIN,  
Its Secretary.

UNION OIL TOOL CO.

Incorporated February 23, 1901.

I produce herewith copies of circulars gotten out by the Union Oil Tool Company in regard to their reamer. They were given to me by the Union Oil Tool Company. I received a lot of them at the time, sometime within thirty or ninety days after entering into the agreement.

A. 49. The substance of it, the whole transaction was that Mr. Koenigstein came to my house one night and told me that Mr. Double wanted to see me with regard to the underreamer business. I went down and met him, and he said he believed that by making some small [256] improvements in it that he could make a good market for the underreamer, that it could be made cheaper than his own; and while he did



(Testimony of Edward North.)

not admit in so many words that it was better than his own, he said that in a great many cases he thought it would work as well, and he knew that I was not financially able to push the sales, and he thought that the agreement between us would be to our mutual advantage; and he agreed, among other things—it is in the contract there—that he would push the sales in the east as well as in California and other parts of the United States. On the strength of that and on being urged a little by Mr. Lyon, I agreed to give him a half interest in it; I did not wish to at the time; I intended to give him only half of the profits; but I was persuaded into assigning to him a half interest in the patent.

Nevertheless, I never received a royalty and presume he sold no reamers of that type.

In my opinion, his purpose was to simply sidetrack my reamer, and especially to stop Mr. F. W. Jones, who was then manufacturing a reamer which was getting on the market and which infringed my patent; evidently Jones was compelled to assign his application for patent to Mr. Double and myself and shortly thereafter he took a position working for Mr. Double as a machinist.

Mr. LYON.—We object on the ground that the ideas are merely conclusions, expressions of opinion; and that the witness should state facts; and on the further ground that it is apparent that the question calls for incompetent matters.

Mr. BLAKESLEE.—It is believed proper to adduce evidence going into the relations of the witness

(Testimony of Edward North.)

and Mr. Double pursuant to their agreement of October 11, 1904.

I have testimonials to the effect that North reamer was a thoroughly practical reamer, that is, the original, before the improvements were made. [257]

Q. 55. At the time you entered into this arrangement with Mr. Double and his company, did he point out any defects in your underreamer?

A. I believe not; I don't recollect that he did. I knew there were defects in it.

Q. 56. Did he state to you any of the improvements that he had in mind?

A. I don't remember that he did. Pardon me. I think that [258] he said, however, that there were defects which he believed he could remedy.

A. 61. The main, and in fact, the only drawback to it, after I got the second latch on, was that the reamer had to go too far below the casing before the cutters were sprung up into operative position. In some cases where there would be, as near as I could figure it out, a small cave just below the casing, the cutters would throw apart and catch, perhaps, on some protuberance there, and the weight of the tools would come down on that and pry the T-head off of the spring rod and leave the cutters in the hole. That would happen in perhaps a third of the cases where it was run. I don't believe it would be as much as that; perhaps three-quarters of the cases where the latch got below the casing before the cutters caught on anything, and the reamer worked perfectly.

While Mr. Double stated the trouble he had had



(Testimony of Edward North.)

with the North improved reamer he did not give it as a reason for stopping the work on that reamer.

Q. 66. Did Mr. Double ever make any statement to you explanatory of the fact that no payments of any nature were made to you as you have testified they were not, in accordance with the arrangement entered into by and between yourself and himself and by and between yourself and himself and the Union Oil Tool Company?

A. He did not. He stated trouble had been had, but did not give it as a reason for stopping the work.

The only reason I can advance for his discontinuing to advance or improve or sell the North under-reamer is that I understand Mr. Double gets \$50 apiece royalty on the Union reamer and he was only getting \$25 on mine. I received the information direct from Double as to the royalty he gets from the Union Tool reamer. As to the royalty on my reamer the agreements speak for themselves. Mr. Double was to receive one-half of the \$50 royalty, *and* the Union Tool Company agreed to give us on the manufacture [259] of that reamer.

Mr. LYON.—We move to strike the answer from the record and exclude it from consideration on the ground that it is hearsay, not the best evidence, and incompetent.

Q. 69. (By Mr. BLAKESLEE.) Please state such source of information as you have as to the royalties on the two reamers to which you have last referred.

(Testimony of Edward North.)

Mr. LYON.—Same objection.

Q. 73. When did you first see a Double under-reamer?

A. I should say—I can't recollect absolutely, but I should say some time in 1902. Pardon me, if this is in order; if not, the reporter will strike it out. The Double reamer got some ideas from a patent named the Brown patent and the model of the Brown patent was shown to me some time in December of 1901 by Ralph Irwin at the St. Elmo Hotel, and at that time, to the best of my knowledge and belief, no Double reamers had been manufactured. The Brown patent was impracticable in many respects. There were only few points about it which are now embodied in the Double reamer or what is called the Union reamer.

I saw Double reamers in 1904. I was around the shop a good deal at the time we made the agreement.

Q. 79. Can you state from your own knowledge a number of particular devices or apparatus used at the present day in oil well producing and name to me those that you consider of particular importance?

A. Do you mean with regard to improvements and drilling operations generally?

Q. 80. Yes, exactly.

A. There are four that have had more to do with the drilling of deep wells than anything in the history of drilling in California, namely, the under-reamer, the calf wheel, heavy pipe, and wire drilling cables. Without any one of those four it would be impossible to get to the depth that they are able to get to now. [260]



(Testimony of Edward North.)

Q. 81. Please state the part that each of these devices plays in the successful drilling of deep wells.

A. The underreamer is especially valuable in a caving formation where there are numerous shells, in other words, streaks of very hard rock which it is impossible to drive a pipe through. Under the old methods, it would be necessary to pull the entire [261] string of casing out of the hole at the risk of cavings filling up above the shell so as to interfere with using the old fashioned solid reamer. At the present time all they have to do is to lift the casing six or eight feet, run in an underreamer, which will cut a hole through the shell large enough for the casing to follow it. The calf wheel—or, as you will find it referred to in some of the oil-well supply catalogs, a second or subsidiary bull wheel—is used to save time in lifting the casing, it not being necessary to raise the tools out of the hole and go through the operation of putting through casing-blocks, and a whole lot of bother of that kind, which would take several hours. It does not take now five minutes to change from the drilling operations to lifting the casing, and that is on account of the calf wheels. The heavy pipe will stand driving and stand excessive water pressure, as the old light casing would not. And the wire lines, on account of their being smaller and heavier, will enable the tools to drop much more readily with the hole full of water, which sometimes results from a flow from beneath, and sometimes is put in in order that the hydrostatic pressure may hold the cavings back, and with the wire lines, the

(Testimony of Edward North.)

weight of the line itself will assist the tools to drop; whereas, in the case of manila lines, they help to float the tools below a certain depth. It is a very difficult matter in the use of manila lines to drill with more than three or four hundred feet of water in the hole. Now, they can drill with 2000 feet of water in the hole more readily than they could drill in the old time with 300 feet.

Q. 82. Can you recollect when each one of these features or factors of the art of well drilling came into use?

A. The first that I knew of any calf wheels being used was by J. M. Kellerman in the winter and spring of '99 and 1900. At that time Mr. Kellerman was using also an underreamer of his own device. The heavy pipe, the first that I knew of being used here, was imported by the Union Oil Company for use in Torey Canyon in 1900, possibly 1899, but my recollection is pretty strong 1900. [262] The wire cables were introduced, I believe, about 1902 or '03, can't say positively; I don't know who used them first. I presume Mr. Kellerman, as he was practically the pioneer in all new devices.

Q. 83. Will you please state what effect, if any, the introduction and use of the calf wheel and the wire rope and heavy casing had upon the use of underreamers?

A. Well, it facilitated the use of underreamers quite materially, and made possible the use of them at greater depths than they could be used otherwise.

Q. 84. And can you state in what manner they had



(Testimony of Edward North.)

this effect upon the use of underreamers?

A. The calf wheels made it much more feasible to use an underreamer on account of the great saving of time in lifting the casing. The heavy pipe was able to withstand heavy water pressures; and the wire lines enabled one to get much better results in the drilling operations on account of getting a freer fall of the tools. Perhaps I should explain there that the old method used to be, if you run on to a shell, and tried to drive your casing through it, shaving off the sides with the shoe, it had a great tendency to batter casing and perhaps lose the hole. And in many instances they would try to drive on account of its taking a couple of hours time to rig up to pull the casing, whereas, with the calf wheels, it did not take five minutes.

Q. 85. In treating of the calf wheel, the heavy casing, the underreamer, and the wire rope, and their effect upon the art of underreaming, to which, if anyone, of these factors would you attribute the greatest advantage or the most importance?

A. That is hard to say. I should say probably the calf wheel.

Cross-examination.

(By Mr. LYON.)

Q. 89. How did it happen, Mr. North, that you went to work to devise the original reamer shown in "Defendant's Exhibit North [263] Patent 674,793"?

A. I was working at that time superintending the drilling of a well up about Piru, and I had heard

(Testimony of Edward North.)

that there were reamers out, underreamers in successful use, and I had seen the Austrian, and being of a slightly inventive turn of mind, I thought I could get one that was better than those in existence.

Q. 90. Your information at that time was that there were successful underreamers?

A. Yes, sir.

Q. 91. And when was it that you were doing this drilling?

A. In 1900. The latter half of 1900.

Q. 100. Now, is it not a fact, Mr. North, that you did come to my office for the first time in reference to what terminated in these contracts, at my request directly conveyed to you, and that you knew nothing about what the subject matter was until you came up there?

A. I can't say about that. I don't think that is so.

Q. 101. And didn't I explain to you that Mr. Frederick W. Jones of Santa Paula had made what seemed to be an improvement upon the underreamer of your patent 674,793 and an infringement thereon?

A. I don't think so.

Q. 102. Will you state positively?

A. I can't state positively, but I don't think so. That matter was brought up, according to my recollection, by Mr. Double at the time we had our first talk.

Q. 103. Did you have a talk with Mr. Double in regard to that matter before you talked with me?

A. I think so.

Q. 104. That is your present recollection?



(Testimony of Edward North.)

A. That is my present recollection, yes, sir.

Q. 105. And was this contract of October 11, 1904, entered into between you and Mr. Edward Double in writing before you had canvassed the situation in regard to this intervention of Mr. Frederick [264] W. Jones to which I have referred?

A. I think not.

Q. 106. Isn't it a fact, Mr. North, that as part of the agreement between Mr. Double and yourself, he agreed to acquire and did acquire the said Jones invention and caused the same and the application for patent therefor to be assigned equally to you and to himself?

A. It is.

Q. 107. Who paid the money for such assignment?

A. Mr. Double or the Union Oil Tool Company, I don't know which.

Q. 108. Do you remember how much was paid?

A. I think it was \$150; I am not sure.

Q. 109. Do you know who paid the cost of the prosecution of the application of Frederick W. Jones for patent on that improvement?

A. After that assignment it was paid by Mr. Double.

Q. 110. That was part of the agreement?

A. Yes.

Q. 111. And that application eventuated in the issuance to Mr. Edward Double and yourself of letters patent of the United States 809,570, dated January 9th, 1906, did it not?

A. I can't say as to the number. I have got the patent here.

(Testimony of Edward North.)

Q. 112. Here is a copy, if you want to look at it.

A. That is right, 809,570.

Q. 113. Now, isn't it a fact that the license agreement or contract between Mr. Double and yourself on the one part and the Union Tool Oil Company on the other part was for the purpose of manufacturing the North reamer as thus improved by Mr. Frederick W. Jones? A. It is not so specified.

Q. 114. Wasn't it talked over?

A. I don't think so.

Q. 115. Wasn't it distinctly talked over between yourself and myself at the time of drawing said instruments? [265]

A. I don't think so.

Q. 116. Will you testify that it was not?

A. I can't say positively.

Q. 117. What improvements did Mr. Edward Double make in the North reamer?

A. Did away with the latches; made the cutters in such shape that they would go down the hole without the use of latches to hold them retracted.

Q. 118. Are not those features shown in this patent to Mr. Jones, 809,570, to which I have called your attention?

A. Well, some of the features, but the Jones reamer was not the only one that had that feature.

Q. 119. Wasn't the subject matter of that improvement the Jones invention; and the doing away with the latches to which you have referred and the use of the two chambers 4 and 6, the lower chamber having a straight wall or cylindrical wall, and the



(Testimony of Edward North.)

upper chamber having an inclined or conical wall, as shown in said Jones patent?      A. No.

Q. 120. Was not the reason for entering into these contracts and the acquisition of this Jones invention and the agreement by the Union Tool Oil Company to manufacture the Jones underreamer, or, as you have termed it, and the Union Tool Oil Company afterwards termed it, the improved North reamer, the fact that Mr. Double and you yourself, after this Jones invention was explained to you by me, both considered that there was a possibility of the North reamer as thus modified and particularly with the use of this double chamber to which I have referred, making the North reamer a satisfactory tool, and was not that talked over between yourself and myself prior to the drawing of the two agreements?

A. I think not.

Q. 121. Will you testify that it was not?

A. Yes. [266]

Q. 122. Do you know or have you ever been informed by anyone how many improved North reamers either the Union Oil Tool Company or the Union Tool Company manufactured?

A. There were four manufactured to my knowledge.

Q. 123. Were you not informed there were six manufactured?      A. No.

Q. 124. Do you know what was done with the four?

A. Two of them were rented out, all I ever knew being done with them.

Q. 125. Were either of them ever sold?

(Testimony of Edward North.)

A. Not to my knowledge.

Q. 126. Do you know whether either of them ever gave satisfaction?

A. I know there was trouble with both of them.

Q. 127. And is it not a fact that you have been informed on more than one occasion that the reason why the improved North reamer had not been manufactured in greater quantities and had not been sold in quantities was that there was no apparent sale for it, that it was unsatisfactory? A. No.

Q. 128. You so testify under oath?

A. Yes, sir.

Q. 129. Have you ever asked either Edward Double or any officer of the Union Oil Tool Company or the Union Tool Company for a surrender of the license contract of October 11, 1904?

A. I tried to get some sort of figure on the—no, not on that. No, I have not, not of a manufacturing license. I tried to get Mr. Double's interest once in the patent; he would not sell it.

Q. 130. Or in regard to the royalty that you say Mr. Double said the Union Tool Company was paying him on his reamer, again, aren't you mistaken in that regard? Was it not when I first talked with you about this deal including this Frederick W. Jones invention that you and I discussed the question of royalty, and I told you that the [267] Union Tool Company was paying \$50 royalty on the Union or Double?

A. I have no recollection of it at all.

Q. 131. Will you testify that I did not have that



(Testimony of Edward North.)

conversation with you instead of Mr. Edward Double?

A. You may have had it, but Mr. Double had it also.

Q. 132. And that the conversation was that you would fix the royalty on the so-called improved North underreamer at the same royalty, wasn't it?

A. \$50 a piece was what was specified.

Q. 133. Isn't it a fact that at the same time the question of the acquisition of the Frederick W. Jones invention was brought up and you stated to me that you did not have and could not put any money into the acquisition of such invention?

A. That may be true; I don't know; I didn't have the money, I know that.

Q. 134. Did you not tell me that you would not invest money in that?     A. I don't think so.

Q. 135. At that time you thought, did you not, and so expressed yourself to me, that modifying your original reamer of your patent number 674,793 as thus suggested by Mr. Frederick W. Jones of Santa Paula, and by him embodied in a reamer, would make a satisfactory and successful reamer of the North reamer and one which would compete with other reamers then on the market?

A. My recollection is that the Jones reamer was not considered in any way in connection with the agreement between Mr. Double and myself, with the exception of the fact that we did not wish to have an infringement suit on hand, and considered the best way to get out of that was to get Mr. Jones application, which we did.

(Testimony of Edward North.)

Q. 136. Will you testify positively that you had any portion of the negotiations eventuating in these contracts of October 11, 1904, with or that you saw Mr. Edward Double prior to the time of drawing the contracts?     A. Yes, sir. [268]

Q. 137. How many times would you say?

A. I don't remember.

Q. 138. More than once prior to the drawing of the contracts?

A. I can't say. All I have in mind particularly is meeting him at his office one evening and going into the matter.

Q. 139. When did you first meet Edward Double?

A. I think in 1899, at Santa Paula.

Q. 140. Was Mr. Double at Santa Paula in 1899?

A. Yes, sir.

Q. 141. Where were you engaged in work in 1900?

A. Up until some time in June—now, I can't say positively whether the first month or two of the year I was working on the Piru ranch for David Cook or not. Subsequent to that time I was field superintendent of the Brea Canyon Oil Company in the Fullerton field, and left there about the 1st or the 15th of June to go into the upper Piru and take charge of the drilling of this Berkeley well I have referred to.

Q. 142. How many times were you in Santa Paula during the latter part of 1900?

A. I couldn't say; not very often. My business didn't call me there very much.

Mr. LYON.—That is all.













